

(2005) 03 GUJ CK 0025
In the Gujarat High Court

Case No : Civil Application No 12644 of 1999 in First Appeal No's. 6911 and 7847 of 1999 with Civil Application No's. 8864 of 2000, 2748 of 2002 and 2181 of 2003

Yuvraj Prithvirajsinhji

APPELLANT

Vs

Maharani Rajendrakunvarba Saheb

RESPONDENT

Date of Decision : 02-03-2005

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 135(D)
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 43 Rule 1, Order 7 Rule 11
Hindu Succession Act, 1956 — Section 4, 4(1), 5, 9
Transfer of Property Act, 1882 — Section 52

Citation : AIR 2006 Guj 84

Hon'ble Judges : D.K. Trivedi, J;C.K. Buch, J

Bench : Division Bench

Advocate : D.C. Dave in First Appeal No. 6911 of 1999 and Civil application No. 12644 of 1999 and R.D. Dave in First Appeal No. 7847 of 1999, for the Appellant; S.B. Vakil and R.D. Dave for Respondent No. 1, C.H. Vora, for Respondent No. 6, Pratapsinh Rathod, for Respondent No. 11 and Shalin N. Mehta, for Respondent Nos. 12-13 in Civil Application No. 12644 of 1999, R.D. Dave, in First Appeal No. 6911 of 1999 and D.C. Dave, in First Appeal No. 7847 of 1999, for the Respondent

Judgement

C.K. Buch, J.—Heard learned counsel appearing for the parties in detail and as per the oral request extended by them, we have accepted written submissions in brief for convenience and in the background of intrinsic facts and legal points involved in the matter. The learned counsel appearing for the parties have argued at length and they have also submitted, in brief, their submissions in writing, and therefore, we have dealt with certain factual as well as legal aspects and their merits prima facie; and without prejudice to the rights and contentions of the parties on all the points, so that they can make their points good while placing their say arguing the above First Appeal. Our findings, therefore, are tentative and we have recorded them for the purpose of dealing with present

Civil Application.

2. The present Civil Application is moved by the applicant-appellant-orig. plaintiff (hereinafter referred to as "the plaintiff") praying for interim relief that pending hearing and disposal of the First Appeal No. 6911 of 1999, the operation of the impugned judgment and decree under challenge dated 15th September, 1999, in the aforesaid First Appeal passed by the Civil Judge (S.D.), Bhuj at Kachchh, in Special Civil Suit No. 68 of 1990, may be stayed, and thereupon, the opponents-respondentsorig. defendants (hereinafter referred to as "the defendants") may be restrained from transferring, alienating or encumbering the properties, referred to and described as joint family properties in the said Suit by the plaintiff, in any manner which can be said to be prejudicial to the rights, title and interest of the plaintiff. It is further prayed that till the disposal of First Appeal, the defendants and/or their agents, servants and persons claiming subordination under any of the defendants may be restrained from dealing with the Suit properties or any part thereof in any manner prejudicial to the rights, title and interest of the plaintiff on the premise that the said properties are joint family properties.

3. The Suit filed by the plaintiff is dismissed by the lower Court by the aforesaid judgment and decree, which is under challenge by way of aforesaid First Appeal. The plaintiff instituted the Suit inter alia seeking decree for partition in respect of the properties described in the Suit as joint family properties on the premise that the plaintiff is having 1/3 (one third) share in respect of the same and, therefore, they are required to be partitioned by metes and bounds amongst the members of the joint family referred to by the plaintiff. While dismissing the Suit, the lower Court has preliminarily observed that the Suit properties failed to qualify as joint family properties on account of the same being subject to doctrine of impartible Estate and rule of Primogeniture prevailing in the family of the plaintiff. The family of the plaintiff is a Royal family of old State of Kachchh. Undisputedly, the appeal has been admitted by this Court on 15th November, 2000, after hearing the contesting parties. It would be beneficial to quote the order admitting the appeal, where the Division Bench of this Court has observed that :

"Rule.

Service is waived on behalf of Respondents No. 1, 10,11,12 and 13 by Mr. R.D. Dave, Mr. P.H. Rathod, and Mr. Jayant Patel respectively. Notice of Rule would therefore go to the remaining respondents only and the same is made returnable on 18.12.2000.

In this case an order of status quo was passed on 3.11.1999 and that order is continuing with consent of both the sides throughout. Mr. Patel has made submissions contesting the continuance of the interim order. We have considered the submissions made by Mr. Jayant Patel appearing for Respondents No. 12 and 13. the dispute is about immovable property between the family members except for respondents No. 12 and 13, who are represented by Mr. A.J. Patel. Prima

facie at this stage we are not satisfied to discontinue the order of status quo, which was granted on 3.11.1999 and has continued throughout with the consent of both the sides. We have admitted the Appeal today after hearing the parties who are present.

We have issued Rule in this C.A. today and the other respondents who are not represented and no one is present on their behalf today are to be served now and only thereafter final order shall be passed in this matter. It is therefore ordered that the order of status quo shall continue till all the parties are served and this C.A. is finally heard."

4. Thus, while admitting the appeal, this Court in respect of the present Civil Application passed an order simultaneously and directed the contesting parties to maintain status quo granted earlier and to continue it till the Civil Application is disposed of after causing service of Rule issued therein, as some of the parties were absent on the day of admission of the appeal i.e. on 15th November, 2000. It is important to note that when the First Appeal and present Civil Application were circulated for admission hearing on 2nd November, 1999, the admission hearing of the present Civil Application was adjourned to 24th November, 1999 by consent and the Court passed orders "Status quo as on today to be maintained till then." Thereafter, this interim arrangement worked out continued till the above referred order came to be passed on 15th November, 2000. The unserved defendants who were absent on 11th November, 2000, in the appeal and present Civil Application, were served with the process issued by the Court.

5. Mr. D.C. Dave, learned counsel appearing for the plaintiff, states that the interim direction issued by this Court dated 11th November, 2000, should be construed till final hearing and disposal of the Appeal as the plaintiff was heard on merit and the resistance by the parties who were absent only had scope to get the order of status quo granted vacated. It is further submitted that so far as the merits of the present case are concerned; and as the Appeal is involving various questions of law and facts, as well as complex mixed questions of law and facts, this Court while hearing the First Appeal shall have to appreciate the conduct of the parties in the background of the events that have occurred pending Suit and after delivery of the judgment and decree in the said Suit. So according to Mr. Dave, it is easy to infer that the plaintiff is having strong prim facie case and during oral submissions, he has attempted to demonstrate the strength of the case of the plaintiff. The present Civil Application has been resisted mainly by the defendant nos.3, 4, 5, 8, 12 and 13. Of course, the stand taken by the defendant nos.12 and 13 is materially different than the stand taken by other contesting defendant nos.3,4,5 and 8.

6. We have considered the reply affidavits filed by the contesting defendants. To appreciate the say and nature of the dispute, which requires to be dealt with on merit while dealing with the First Appeal, we think it necessary to reproduce certain part of the reply affidavit filed by the defendant nos.12 and 13. This reply affidavit is sworn in by Patel Gopal Mavji Gorasiya i.e. defendant No. 12, whereby

he has stated that :

" XXX XXX XXX

2. I say and submit that the original plaintiff-applicant herein himself has admitted earlier while acting as the Power of attorney holder of his late Father namely Maharav Shri Madansinhji, has admitted that the property received by him as the private property, after the merger of Kutchh State into the Union of India, are absolute and individual and "Aaji-ugra" property of his father late Maharav Shri Madansinhji.

It is submitted that the said documents are already there on the record and the aforesaid happened as back as in the year 1972. It is submitted that thereafter, the other properties including the land bearing old revenue survey No. 1431 and new revenue survey No. 124 admeasuring 11 Acres and 35 gunthas (hereinafter referred to as the land in question, for the sake of brevity) had continued as the absolute property of Maharav Shri Madansinhji. It is submitted that in the year of 1978, late Maharav Shri Madansinhji, against the valuable consideration had sold the land in question by a Registered sale-deed to minor Satyajitsinh Hanvantsinhji and Pratapsinh Hanvantsinhji. It is submitted that the said property since then remained in the absolute ownership and title of the then minor Satyajitsinh Hanvantsinhji and Pratapsinh Hanvantsinhji. Further, not only that but when the said land in question was proposed to be acquired by the Gujarat Housing Board, since it was the absolute property of Satyajitsinh Hanvantsinhji and Pratapsinh Hanvantsinhji, they had to prefer the Spl. Civil Application No. 810 / 1986 before this Hon'ble Court, challenging the said acquisition proceedings and the stay was also obtained by them. It is submitted that ultimately, since the acquisition proceedings were dropped the petition was disposed of on 25th November, 1991. A copy of the said order is already produced on record and hence the contents thereof are not repeated, so as not to burden the record. It is pertinent to note that the original plaintiff after the lands were sold by late Shri Maharav Madansinhji to minors Satyajitsinh Hanvantsinhji and Pratapsinh Hanvantsinhji, did not object to such a Sale and even he did not intervene in the proceedings of the Special Civil Application No. 810 / 1986. It is submitted that since 1978, and until the opponent No. 12 and 13 purchased the land in question, it remained in absolute and continuous possession and ownership of Satyajitsinh Hanvantsinhji and Pratapsinh Hanvantsinhji. Further not only that but the revenue entry was mutated for the land in question in their favour and they were paying the revenue and in village form Nos.7 and 12 as well as in village form No. 8-A also, namely the record of rights, the land in question stood on the names of Satyajitsinh Hanvantsinhji and Pratapsinh Hanvantsinhji. It is submitted that since there was no prohibition against the transfer of the land, the opponents No. 12 and 13 have purchased the same by paying a huge consideration of Rs.40.00 lacs. It is submitted that in any case, prior to the date of purchase when the suit was pending before the Civil Court, at that time also, the undertaking given by late Maharav Madansinhji

of not to transfer or alienate the property and the said undertaking would be on his name and it could not be made applicable qua the property, which he had already sold by a Registered sale-deed in the year 1978 to minor Satyajitsinh and Pratapsinh. Moreover, Shri Hanvantsinhji had given an undertaking on his behalf as well as on behalf of his minor son Satyajitsinh and Pratapsinh only to the extent of not parting with the possession, pending the suit and such undertaking of Hanvantsinhji would automatically come to end on attaining the majority by Satyajitsinh and Pratapsinh and hence even pending the suit prior to date of purchase it could not be said that any injunction was operating or there was any injunction was operating or there was any authority or valid undertaking by Satyajitsinh or Pratapsinh. It is pertinent to note that the sale-deed is executed by Satyajitsinh and Pratapsinh and not by Hanvantsinhji and in any set of circumstances neither injunction nor any undertaking was operating on the date when opponent No. 12 and 13 purchased the property, when they paid a huge consideration of Rs.40.00 lacs."

7. In paragraph:3 of the said reply affidavit, defendant No. 12 has further stated that :

"3.though it has been pleaded in the plaint, no evidence has been led by the original plaintiff so far as the land in question purchased by the petitioner is concerned. It is submitted that on the contrary, from the deposition of Shri Hanvantsinhji, more particularly, from the cross-examination, it is apparent that the land in question is purchased by the opponents No. 12 and 13 against a consideration and the opponents No. 12 and 13 have lawfully purchased the land in question. It is submitted that the evidence on record clearly shows that the original plaintiff was not at all serious for challenging the sale-deed executed in the year 1978 in favour of Satyajitsinh Hanvantsinhji and Pratapsinh Hanvantsinhji, by late Maharav Madansinhji, nor in challenging the sale-deeds dated 19th January, 1996 executed in favour of the opponents No. 12 and 13. It is submitted that the Learned trial Judge has found that all the properties held by late Maharav Shri Madansinhji were the absolute and impartible properties and therefore, the suit of the plaintiff has been dismissed. It is submitted that in any case, the total suit property is worth more than about Rs.200.00 CRORES out of which, the original plaintiff as per his own say in the plaint, is having only 1/3rd share. It is submitted that as stated above, the land in question is purchased by the opponents No. 12 and 13 against the payment of consideration of Rs.40.00 lacs and the transaction of the purchase of the land in question by opponents No. 12 and 13, at no point of time is challenged in evidence of the suit by the original plaintiff and therefore, the land in question can safely be excluded for the purpose of deciding the present civil application,"

8. In paragraph :4 of the said reply affidavit, defendant No. 12 has further stated that :

"4.I say and submit that it is also pertinent to note that it is also agreed in writing in the sale-deeds dated 19th January, 1996 when the opponents No. 12

and 13 purchased the property against a consideration that in case a dispute arises in respect to the legal heirs of late Maharav Madansinhji, the land in question shall be taken into consideration in the share, which may be made available by late Maharav Shri Madansinhji and such a document is consented as a witness by Shri Hanvantsinhji. And therefore, to meet with the ends of justice and to maintain the equity, the land in question can be clubbed for the purpose of counting the share of late Maharav Shri Madansinhji and / or Shri Hanvantsinhji because the former has received the consideration and has executed the sale-deed and the later has consented to the sale to the land in question, in favour of the original plaintiff by his sons Shri Satyajitsinh Hanvantsinhji and Pratapsinh Hanvantsinhji, who have received the huge consideration of Rs.40.00 lacs. Under these circumstances, it is submitted that so far as the land in question is concerned, stands on a different footing. Moreover, it is submitted that the opponents No. 12 and 13 are desirous to develop the land in question and if the litigation between the plaintiff and his father and brothers are dragged on, an irreparable loss and injury would be caused to the opponents No. 12 and 13 more particularly, when the opponents No. 12 and 13 have already paid up the huge consideration and the balance properties are available and the Hon''ble Court can effectively grant the relief, even if the plaintiff succeeds in establishing the case. It is submitted that the opponents No. 12 and 13, as stated above, are desirous to develop the land in question and since it is an open land, it is difficult to maintain the land by avoiding the encroachment, etc. and a huge expenses are to be made for maintaining such a status of the land in question by the opponents No. 12 and 13."

9. For short, the stand of defendant nos.12 and 13 is slightly different than other contesting defendants. The say of defendant nos.12 and 13 is that they are bona fide purchasers for value with notice. They were aware about the pendency of litigation and when they have purchased the property in question from an absolute owner on consideration, at least they should be permitted to develop the land in question i.e. land bearing Survey No. 124 situated at Bhuj, which is the subject matter of the Suit. It is contended that on the date of execution of two sale deeds i.e. 9th January, 1996, there was no injunction or any order in the nature of prohibition from any competent Court either against defendant nos.12 and 13 or the vendor defendant nos.4 and 5. While placing this case, the defendant nos.12 and 13 have placed reliance on various facts stated in the affidavit as well as on the fact that the land bearing Survey No. 124 was specifically excluded by the trial Court vide order on application at Exh.190 filed by the plaintiff, from the order of status quo granted in respect of other properties. Referring to pg.100 to 103 of the paperbook, it is argued that the Presiding Judge of the competent Court after considering the facts placed before him excluded one property i.e. land bearing Survey No. 124. To uproot the say of the plaintiff, it is also contended that the lease of the suit was not registered by the plaintiff so as to prohibit the sale of the land bearing Survey No. 124, pending Suit or appeal as per the provisions of Section 52 of the Transfer of

Properties Act and, therefore, the sale of the land bearing Survey No. 124 by defendant nos.4 and 5 in favour of defendants nos.12 and 13 cannot be said to be against the scheme of Section 52 of the Transfer of Properties Act. It is contended that the sale of land bearing Survey No. 124 within one day of rejection of the complaint vide order dated 18th January, 1996 cannot be said to be bad only for its timing, as there was no prohibition to such sale existing in law on that day. While appreciating the strength in the case of the plaintiff, according to us, this aspect may be considered as an important or relevant aspect and it would not be proper for us to comment upon the conduct of the contesting defendant nos.4,5,12 and 13 because it will be difficult to presume that somebody was aware about the outcome of the application Exh.190 and the contents of the application Exh.191, referred to by us. We are not aware as to at what point of time during the course of office hours the order dated 18th January, 1996 was passed. But in the background of provisions of the Stamp Act, and relevant rules framed thereunder and other regulations concerning the sale of non-judicial stamp papers, whether it was physically possible to get the sale deed executed on 19th January, 1996, will be a matter of appreciation in detail. Of course, this fact situation shall have to be appreciated by this Court while hearing the appeal in the background of the stand taken by the defendant nos.3,4,5, and 8 because it is jointly contended by the defendant nos.3,4,5,8,12 and 13 that the properties referred to by the plaintiff are sovereign impartible Estate, which came to be recognized as private properties of the last Ruler Maharao Madansinhji by way of merger agreement dated 4th May, 1998 and they stand exempted from the provisions of Hindu Succession Act, 1956 (hereinafter referred to as "the Act") u/s 5(ii) of the Act. It would be beneficial to refer to the said Section 5(ii) of the Act, which is as under :

"5(ii) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act."

10. So this Court while hearing the Appeal shall have to appreciate whether the custom of impartibility stands destroyed by coming into force of the Act with effect from 17th June, 1956, because according to the contesting defendants, this stand of the plaintiff is misconceived. It will be difficult for this Court to decide finally though it is argued at length before us that the custom of impartibility does not find any reference in the Act; especially Section 4 of the Act, which gives an overriding effect to the Act, and which only states that "any context rule or interpretation of Hindu law or any custom or usage as part of that law enforce immediately before the commencement of this Act shall cease to effect with respect to any matter for which provision is made in this Act." Since the custom of impartibility finds no reference in Section 4 of the Act, the question of application of Section 4(1)(a) of the Act simply cannot be raised, is one of the main submissions of the contesting defendants. The another point placed before us by the plaintiff is that he has ample scope of success in the Suit

and he has not simply raised any triable issues. In support of this submission Mr. Dave has taken us through the relevant provisions of repealed Articles 291 and 362 of the Constitution of India and has argued that with effect from 28th December, 1971, these articles have been repealed by 26th Amendment Act and that would bring to an end the rule of Primogeniture and custom of impartibility. Mr. Dave has taken us through one decision of the Apex Court in the case of Shri Raghunathrao Ganpatrao Vs. Union of India, and we have considered the relevant parts of the cited decision i.e. paragraph nos.65,66,67,74,75 and 76 as well as paragraph nos.120 to 125. Even for the sake of argument if it is accepted that the defendant nos.4 and 5 have sold agricultural land bearing Survey No. 124 to defendant nos.12 and 13 by registered sale deed within a day because undisputedly, the order of status quo qua all the properties including the land bearing Survey No. 124 was in transit with notice but for valuable consideration, even then this Court shall have to answer the point as to whether this transaction inspires confidence, so the same can be held to be a transaction bona fide and the argument placed by Mr. Dave shall have to be appreciated on merit and on evaluation of the same in the background of relevant law as to whether the defendant nos.12 and 13 really have purchased the property or have purchased a property which is in dispute pending before the competent Civil Court.

11. One of the contentions raised before this Court by the contesting defendants is that it is not in dispute that the partition sought for by the plaintiff in Civil Suit is of sovereign impartible Estate belonging to Maharao Madansinhji-father of the plaintiff. It is true that on the death of Maharao Vijayrajji-father of the plaintiff, on 4th May, 1948, an agreement was executed between the Governor General of India and Maharao Madansinhji to transfer the administration of the State of Kachchh to the domain Government on and from 1st June, 1948. This document has been referred to before us as a Merger document by the learned counsel appearing for the parties and some part of this Merger document is on record even before the trial Court. We do not think it necessary to quote the portions pointed out by the learned counsel appearing for the parties. However, as one of the Article i.e. Article 4 of the said document, has been specifically pointed out to us by Mr. S.B. Vakil, learned senior counsel and Mr. Shalin Mehta on behalf of the defendant nos.12 and 13, we think it relevant to quote the portion of Article 4 of the instrument of accession which reads as under :

"His Highness the Maharao shall be entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of this Agreement.

High Highness the Maharao will furnish to the Dominion Government before the 1st day of June, 1948 an inventory of all the immovable properties, securities and cash balance held by him as such private property.

If any dispute arises as to whether any item of property is the private property of His Highness the Maharao or State property, it shall be referred to a Judicial

Officer qualified to be appointed as a High Court Judge, and the decision of that Officer shall be final and binding on both the parties."

12. The rule of Primogeniture undisputedly was prevailing prior to merger in the Royal family of State of Kachchh; but still this Court will have to appreciate the point raised by the plaintiff as he has fairly arguable strong case on the point that the rule of Primogeniture would come to an end on coming into force of the Act and even if it remains effective, it would apply only to certain type of properties i.e. certain movable properties like Rajdand, Crown (Mukut), Special place of worship or the articles which are useful only to the Ruler in continuing family tradition symbolically. It is also argued by Mr. Dave that on enactment of the Act with effect from 17th June, 1996, any person inheriting the private properties of the Ruler Maharao Madansinhji would not be in a position to ask his claim on the basis of the said rule of Primogeniture. A disputed question is also involved in the matter, whereby this Court is called upon to answer while dealing with the Appeal on merit; a question whether enactment of Section 4(1)(a) of the Act could have any effect in conferring sovereign impartible Estate into joint family properties of the family of Maharao Madansinhji. The principle of vesting whether would apply in such a fact situation is also a question and prima facie it appears that merely because on the strength of power of attorney the plaintiff has sold certain properties of his father Maharao Madansinhji either to the third party or to himself personally would not be a matter of much relevance at this stage and according to us, the same should be considered simultaneously when the effect of the conduct of each party is placed under evaluation and appreciation. It will be too early to say at this stage that the enactment of Section 4(1)(a) of the Act has any retrospective effect or not. It is very likely that the say of the plaintiff may be accepted on merit that at least from 17th June, 1956, all the properties in the hands of Maharao Madansinhji, except symbolic idols, should be construed as joint family properties of the family headed by Maharao Madansinhji.

13. One document shown to us by contesting defendants that concerned notice dated 26th September, 2003, u/s 9 for the purpose of acquisition of part of land was served to defendant nos.12 and 13 jointly by Land Acquisition Officer and the Deputy Collector, Bhuj, itself would not tilt the balance in favour of either party because the land was to be given for laying down the Town Planning Road. The Revenue Authorities are supposed to issue notice to the persons in whose name or in whose favour the registered sale deed is executed in view of the scheme of Section 135(D) of the Bombay Land Revenue Code. This document prima facie shows that the Government considers the defendant nos.12 and 13 as occupant of the said agricultural land bearing Survey No. 124 situated at Bhuj. It is not a matter of dispute that this agricultural land is just adjacent to the palace of Maharao of Kachchh. There are rival claims by the plaintiff as well as contesting defendant nos.12 and 13 as to the actual possession and enjoyment of this parcel of land. Some of the Suits and supplementary proceedings have also seen the day and it is not necessary to comment upon this aspect in view of

nature of arguments placed before us by the parties.

14. One alternative point/argument placed by the contesting defendant nos.12 and 13 before us, which is crucial, is that "continuation of order of status quo against the land bearing Survey No. 124 deserves to be rejected and the present Civil Application deserves to be dismissed as the plaintiff has no prima facie case to stand on in respect of the land bearing Survey No. 124." Obviously, as the contesting defendant nos.12 and 13 are concerned with the said parcel of land and part of the property; this submission is extended saying that no irreparable loss is likely to be caused to the plaintiff inasmuch as he would be adequately compensated for his 1/3 share by the defendant nos.4 and 5 in the event of the plaintiff succeeding in the aforesaid First Appeal. This oral alternative submission impliedly adds some strength in the scope of success of the plaintiff in the Suit for partition; especially in the background of fact that this very parcel of land is adjacent to the very valuable and prestigious property of the family i.e. palace located in city of Bhuj. Whether some amount or money by itself in such a situation can be said to be an adequate compensation also may be a point that may get relevance when the First Appeal is heard finally. It will be difficult for us to say at this stage that the balance of convenience is not in favour of the plaintiff. It is true that the plaintiff is under obligation to satisfy this Court that the balance of convenience is in favour of the plaintiff and therefore, we have considered the say of the plaintiff on all the three points i.e. prima facie case, balance of convenience and irreparable loss. As it is now well settled that each plaintiff is now under obligation to satisfy the Court that he has reasonable scope of success in the Suit in the background of the cause of action pleaded in the Suit and relevant scheme and raising mere triable issues is not sufficient. On scrutiny of the decision under challenge in the First Appeal, it is apparently clear that various disputed questions of facts and different law points are involved in the matter. Undisputedly, the Appeal has been admitted by this Court. After inter-party hearing and as the Court prima facie finds that there is some strength in the say of the plaintiff, this Court has admitted the Appeal and granted status quo. When the status quo was granted after hearing the parties, at least the parties who have addressed the Court technically, should agree to continue the arrangement worked out and obey the order of status quo till the disposal of the Appeal. We have found from the affidavit-in-reply filed by the contesting defendant nos.3,4,5, and 8 that certain conditions placed before us and mentioned in the reply affidavit are dehors of their basic pleadings i.e. written statement and other averments that were placed before the lower Court during trial. According to Mr. Dave, this contentions have been raised solely with a view to see that their case falls within the scope of certain judicial pronouncement upon which they intend to rely. It is argued that the written statement of the father of the plaintiff at Exh.109 in the Suit, supporting the other contesting defendant nos.3,4,5 and 8, reveals that the suit properties are described by him as his private properties as inherited by him along with the Raj on account of the rule of Primogeniture prevailing in the Royal family of State of Kachchh. So

according to Mr. Dave supporting defendant No. 1 has also attempted to draw a line between the suit properties and the Raj, which would qualify sovereign Estate. So when the main defendant has tried to draw a line between the suit properties as private properties and the Raj, inherited by him as sovereign Estate, in that eventuality the legal contingency i.e. repealing of Articles 291 and 362 of the Constitution of India and provisions of Sections 4 and 5 of the Act, becomes very relevant. The property under absolute control is concept materially different, according to us. Merely because a property is traditionally kept under absolute control of the head of the family would not become or legally construed as a private property of that person controlling or responsible for managing the Estate. Therefore only, the concept of "Karta" of joint family is one of a coparcener or one of the members of a joint family. It is true that the plaintiff has himself averred in para:1 of the plaint that the defendant nos.1,3 and 4 were members of former ruling Royal family of State of Kachchh and prior to 4th May, 1948, the State of Kachchh was ruled by Maharao Vijayrajji and that Maharao Vijayrajji died in or about in the year 1948. According to Mr. S.B. Vakil, in this set of facts, the date of Instrument of Merger i.e. 4th May, 1948 becomes very relevant. The defendant No. 1 received all the properties as impartible sovereign properties as ex-ruler. The administration of State of Kachchh was transferred to the domain of Governor General of India from 1st June, 1948 and in turn, the defendant No. 1 became entitled to receive an annual sum of Rs.8 lakhs as privy purse. Mr. Vakil has placed reliance on the decision in the case of His Highness Maharaja Pratap Singh Vs. Her Highness Maharani Sarojini Devi and Others, Mr. Vakil has drawn our attention to paragraph No. 65 of the decision and it is argued that the rule of Primogeniture is the antithesis of the rule of Division and, therefore, an impartible Estate cannot be partitioned interim vivos or defeated on succession on the death of the holder and according to Mr. Vakil, on this principle only, there is no scope of success for the plaintiff in the appeal. We agree that there is considerable difference between the sovereign impartible Estate and non-sovereign impartible Estate and the differences are to be noted not only in the context such as right to claim interest by birth, right to claim partition and right to restrict alienation by the holder for the time being of the impartible Estate; but it will be difficult for this Court to accept at this stage that the properties described in the Suit fall in the category of properties under sovereign impartible Estate or it remained exclusive non-sovereign impartible Estate in the hands of defendant No. 1. Mr. Vakil has taken us through the decisions of the Apex Court in the case of Ameer-un-Nissa Begum and Others Vs. Mahboob Begum and Others, ; in the case of Director of Endowments, Government of Hyderabad and Others Vs. Akram Ali, and one decision of this Court in the case of D.S. Meramwala Bhayawala v. Ba Shri Amarba Jethsurbhai, reported in (9) GLR 1968 609. The ratio in the case of D.S. Meramwala (supra), we afraid would help the contesting defendants in view of the set of facts placed by the plaintiff and the nature of evidence available on record. It is true that in the case of D.S. Meramwala (Supra), the fact of lapse of paramountcy on the rule of Primogeniture is considered and it is held that on the lapse of paramountcy the

Estate ceased to be governed by the rule of Primogeniture. The rule of Primogeniture was either adopted by Ram Mulu as the Chief of the Estate with the sanction of the British Government as the paramount power or the British Government in exercise of its paramountcy applied the rule of Primogeniture to the Estate. In either case the rule of Primogeniture would, subject to the main contention based on sovereignty which has already been discussed, have force and effect as a binding rule governing all future successions in the Estate. But the ratio of the said decision whether would squarely be applicable is the question required to be answered on merits. Mr. Vakil has also placed reliance on the decisions in the case of the State of Bombay v. Dr. Raghunath Balkrishna Chandrachud, reported in 63 BLR 442 ; in the case of Vinodkumar Shantilal Gosalia Vs. Gangadhar Narsingdas Agarwal and Others, and in the case of Vishnu Pratap Singh v. State of Madhya Pradesh and ors., reported 1990 (supp) SCC 43 . Mr. Vakil has also placed reliance on the decision in the case of N.P.V. Ramaswamy Udayar Vs. All India Subscriber Association and Others, and it would be beneficial to quote the relevant part i.e. paragraph nos.83,86,87 and 88, read over to the Court by the learned senior counsel from the said decision, which is as under :

"83. White Paper on Indian States published by the Government of India, Ministry of States, in its Part VII dealing with "Settlement of Ruler's Private Properties" contains in paragraphs 156 and 157, inter alia, the following statement :

"156. The Instruments of Merger and the Covenants establishing the various Unions of States, are in the nature of overall settlements with the Rulers who have executed them. While they provide for the integration of States and for the transfer of power from the Rulers, they also guarantee to the Rulers privy purse, succession to gaddi, rights and privileges and full ownership, use and enjoyment of all private properties belonging to them, as distinct from State properties. The position about the privy purses guaranteed or assured to the Rulers is set out in detail in Part XI. The provisions of the Constitution bearing on the rights, privileges and dignities of Rulers and their succession to their respective gaddis are also explained in that Part. So far as their private properties are concerned, the Rulers were required to furnish by a specified date inventories of immovable property, securities and cash balances claimed by them as private property. The settlement of any dispute arising in respect of the properties claimed by a Ruler was to be by reference to an arbitrator appointed by the Government of India.

157. In the past the Rulers made no distinction between private and State property; they could freely use for personal purposes any property owned by their respective States."

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86. In view of the foregoing discussion, there can, therefore, be no manner of doubt that the properties in suit were not joint family properties as asserted by

the appellant but were the personal properties of respondent 1 as asserted by him. Consequently no exception can be taken to the dismissal of the suit filed by the appellant by the courts below and Civil Appeal No. 534 of 1983 filed by the appellant deserves to be dismissed. For the same reason, Civil Appeal No. 535 of 1983 filed by Defendants 32, 33 and 34 claiming a larger share in the properties in suit on partition treating them to be joint family properties as asserted by the appellant also deserves to be dismissed.

87. We may, at this place, point out that reliance was placed by learned counsel for the appellant on certain decisions laying down that if joint Hindu family property was by custom or otherwise impartible, its nature of partible joint Hindu family property will get revived on the commencement of the Hindu Succession Act, 1956 and the Kerala Joint Hindu Family System (Abolition) Act, 1975. Reference was also made to several passages from Chapter 12 of Hindu Law by S.V. Gupte dealing with impartible property including the circumstances in which impartible property becomes capable of partition. However, in view of our finding that the properties in suit were not joint family properties as alleged by the appellant but were the personal properties of respondent 1, we do not consider it necessary to deal with them. Neither any principle of law nor any authority has been brought to our notice in view whereof personal properties of respondent 1 could get transformed into joint Hindu family properties wherein the appellant could acquire an interest. Even if we proceed on the basis that the personal properties held by respondent 1 continued to retain the character of impartibility and they became partible subsequently, it would, in no way, advance the case of the appellant inasmuch as it has not been shown to us that the appellant would be an heir of respondent 1 with regard to his personal properties. Apparently such properties would on his demise be governed either by testamentary disposition or would develop on his personal heirs.

88. Another point urged by learned counsel for the appellant was that the covenant could not confer any right in favour of respondent 1 which he did not otherwise possess nor could it take away the rights of the members of the joint Hindu family by accepting the properties in suit to be the personal properties of respondent 1. Suffice it to say so far as this submission is concerned that as has been held above, the properties in suit had been earmarked by respondent 1 as his personal properties which he was competent to do as a sovereign and the government by accepting or approving the list of properties submitted by him as his personal properties in pursuance of the covenant did not purport on its own to create any right in favour of respondent 1 in such properties. The government could have disputed the assertion of respondent 1 that the properties in suit were his personal properties was accepted."

15. It is submitted that the Apex Court has approved the observations made by the Court in the case of Vishnu Pratap Singh (supra). According to Mr. Vakil, while appreciating the strength in the case of the plaintiff or the scope of success, this Court should give weightage to the judgment given by a bench of

three judges. According to Mr. Vakil, the decision cited on behalf of the plaintiff i.e. His Highness Maharaja Pratap Singh (supra), is a Division Bench decision i.e. of two judges. It is submitted that the bench of two judges could not have taken contrary view than the view taken by the three judges" bench earlier.

16. Having considered the decision of the Apex Court cited by Mr. Vakil, we are of the view that on facts probably the bench taking up hearing of the Appeal on merit may reach to a conclusion that the ratio of this decision may not be squarely applicable to the facts of the present case and other circumstances emerging from record. In the case of D.S. Meramwala (supra), the properties were undisputedly construed as sovereign Estate and practically there was no controversy on the said aspect; but any comment with the detailed discussion as to the applicability of the decision in the case of D.S. Meramwala (supra) would amount to dealing with the case on merit on one of the substantial legal questions under controversy. In the same way, the decision placed before us including the decision in the case of Ravathinnal Balgopal Varma (supra) has been commented upon by us because in some of the decisions, on facts it was specifically proved that the properties referred to in those respective litigations were not joint family properties. While dealing with the Civil Application praying confirmation of the status quo granted earlier, we are supposed to consider that if the present application is dismissed, according to us, it would result into indirect dismissal of the Appeal without dealing with the entire case placed by the parties on merit. It will be difficult for us to ignore the observations made by this Court while dealing with an order of rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure, 1908, by assigning reasons in the case of the plaintiff. We would like to reproduce the relevant part of paragraph:34 of the decision in the case of Yuvraj Prithvirajsinhji v. Maharani Rajendrakunverba and ors., reported in 1996(2) GLH 393, which is as under :

"34. The attempt on the part of the appellant by citing these authorities is to show that on and after 1971, when the 26th Amendment came to be passed, the erstwhile Rulers ceased to have any privileges and special rights. If at all they had any, they were completely abolished and they became ordinary citizens like rest of us. This seems to be the position on and after 1971. It may be remembered that the suit was filed in the year 1980."

17. So it is inferable that the plaintiff had established a strong prima facie case and the resistance placed by contesting defendant nos.3,4,5 and 8 needs detailed discussion and appreciation. Of course, the learned counsel appearing for the parties including Mr. Shalin Mehta for the defendant nos.12 and 13 have attempted to comment upon certain attending circumstances on the sale in favour of the defendant nos.12 and 13 in respect of the land bearing Survey No. 124. Unless this Court reaches to a definite conclusion on merit as to whether the sale was bona fide and against consideration or the same was abuse of process of law or an attempt to overreach the process of law or on equity, when the particular sale deed is not challenged on merit by any independent litigation,

the properties bearing Survey No. 124, should be kept undisturbed against the adjustment when the entire asset of joint family is partitioned qua share of the defendants who have executed the sale deed. It will be difficult for us to say at this stage that the order of status quo does not bind or effect the alleged sale transaction in favour of the defendant nos.12 and 13. The Apex Court in the case of Chinnamal and others Vs. P. Arumugham and another, has observed that when a third party purchases the property in litigation with knowledge about the pendency of the dispute before the competent Court, such a stranger or the third person cannot be permitted to claim any precedents over the claim of the contesting parties. According to us, though the facts of the cited decision are materially different, they may help to some extent to the plaintiff because prima facie it appears that the defendant nos.12 and 13 can be placed in the status of speculative purchaser pending litigation. But ultimately this depends on the evaluation of the evidence on record. On the contrary, it can be reasonably inferred prima facie that the defendants ought to have sold the properties and the purchaser defendant nos.12 and 13 were aware about the litigation and they are supposed to anticipate the likely outcome. The deed of conveyance executed and the language of it probably is the first tentative answer to the points raised before us by Mr. Shalin Mehta. It is true that it is not the say of any of the parties that the transaction can be said to be a transaction without notice of pendency of litigation but this fact situation on the contrary helps the plaintiff in getting the interim relief confirmed till disposal of the appeal. We are aware that the plaintiff's submission is in ignorance of the aspect of sovereign impartible Estate and it is alleged that the character of the properties in the hands of Maharao of Kachchh was and is joint family property. The contesting defendants have cited decisions where the Courts were dealing with sovereign impartible Estate and the plaintiff has placed reliance on the decisions which deal with non-sovereign impartible Estate and/or joint family property.

18. In the above discussion, according to us, we have dealt with not only the point of prima facie case but also have impliedly discussed the point of balance convenience. Ultimately, there is no serious contest on properties of very high value and some of the properties referred to in the Suit attracts emotional attachment of the family members of the Ruler of Kachchh. So we do not need to discuss the third point i.e. irreparable loss, which normally is required to be discussed by us. We have focused on nature of Suit and its importance qua the parties and also the socio-economic background of the parties litigating before us. One litigation, concerning removal of the pipeline brought to our notice during the course of hearing of the present application, also would not go to the root of the merit of the present application. Ultimately, this is a Suit on succession but it would be premature to say at this stage that none of the parties including the parties who have executed the sale deed in favour of defendant nos.12 and 13, have any right to have partition.

19. The aforesaid First Appeal is arising out of the judgment and decree drawn in a Suit filed in the year 1980. So practically almost 24 years have passed. The

parties have faced number of Suits and number of supplementary proceedings. But undisputedly, there was alleged vacuum qua the interim relief for some hours on the day on which the trial Court had ordered rejection of plaint under Order 7 Rule 11 of the Code of Civil Procedure. Prior to that particular date of decision, the parties were under obligation to maintain status quo who were defendants of the Suit at that relevant point of time and, thereafter, the parties have maintained status of course, with rival claims as to possession of the property bearing Survey No. 124, which is just adjacent to the palace. The property bearing Survey No. 124 has good potential of development as the same is now part of city of Bhuj and one of the learned counsel appearing for the parties has also informed the Court that there is an evidence on record to show that the occupant of the palace and other serving premises within the palace are getting their regular water supply from the well located in Survey No. 124. We do not see any need to comment upon this submission at this stage. We are not inclined to consider the evidence and other circumstances available on record on merit. We are supposed to deal with one important question as to whether we should allow any change in the status quo of the property during the pendency of the aforesaid Appeal or not. Unless very much justified and exception exists in an old litigation like this, the Court should not justify the status quo, if the same has remained existed for several years.

20. The observations made in the case of *Maharwal Khewaji Trust v. Baldev Dass*, reported in AIR 2004 SCW 6333, would squarely help the plaintiff. The Apex Court while dealing with the matter in reference to Order 43 Rule I, r/w. Order 39 Rule I, has observed that :

"10. Be that as it may, Mr. Sachharis right in contending that unless and until a case of irreparable loss or damage is made out by a party to the suit, the Court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the scheduled property to better use. We do not think in the facts and circumstances of this case the lower appellate Court and the High Court were justified in permitting the respondent to change the nature of property by putting up construction as also by permitting the alienation of the property, whatever may be the condition on which the same is done. In the event of the appellant's claim being found baseless ultimately, it is always open to the respondent to claim damages, or, in an appropriate case, the Court may itself award damages for the loss suffered, if any, in this regard. Since the facts of this case do not make out any extraordinary ground for permitting the respondent to put up construction and alienate the same, we think both the Courts below, namely, the lower appellate Court and the High Court erred in making the impugned orders. The said orders are set aside and the order of the trial Court is restored."

21. The ratio of the above decision propounded a principle that the power of the Appellate Court is limited when the same is called upon to allow changes in order of status quo of property during the pendency of the litigation. In the present case, no exceptional circumstance is emerging from record and set of facts available for which this Court can allow change in status quo order even by imposing conditions. So we are inclined to allow the present application and confirm the order of status quo observing that it is binding to all the parties including the plaintiff. Nobody, pending Appeal, should attempt to alter or change the nature of property, till the disposal of the dispute pending before this Court is finally resolved in the First Appeal.

22. We are told that the record and proceedings are lying with this Court since long. This Court has received records and proceedings from the lower Court when called, without paperbook. The same ought to have been sent with paperbook or at least it was possible to get the paperbook prepared. The appellant even as per High Court Rules is supposed to supply the pleadings. So the plaintiff, in the present case, can be asked to see that he furnishes paperbook for convenience and expeditious disposal of the appeal because the litigation between the parties is old by about 24 years, so we hereby direct the plaintiff to get the paperbooks prepared in accordance with rules by getting the record and proceedings from the Registry at his costs at present at the earliest and one set of paperbook be supplied to the each learned counsel appearing for the contesting defendants. This Court while disposing of the above First Appeal may decide as to who will bear the ultimate cost of preparation of the paperbook. If the original record is sent to the trial Court then we apprehend that the same would result into further delay. The Registry shall cooperate with the plaintiff in getting the paperbooks ready. The plaintiff shall see that the said paperbooks are prepared and tendered to the Registry after serving one copy to each learned counsel appearing for the contesting defendants within four months from today and, thereafter the Registry shall see that the appeal is listed for final hearing before the appropriate Bench taking up hearing of the First Appeal as per the Roster.

23. So far as Civil Application No. 8864 of 2000 is concerned, the same is allowed. The defendant nos.2,10 and 11 be heard in Appeal as heirs and legal representatives of defendant No. 1-Maharani Rajendra Kunverba Saheb and as they are already on record, they can be treated accordingly. Necessary amendment in the cause title be carried out forthwith.

24. So far as Civil Application No. 2748 of 2002 is concerned, we are not inclined to pass any order of mandatory nature. It is not necessary to enter into controversy as to whether any order of status quo has been violated by any of the party-defendants or not. We hereby direct that no further addition and alteration shall be made by any party to the Suit property till disposal of the aforesaid First Appeal and hence, the request to pass appropriate orders by the plaintiff is hereby turned down. It is observed that any construction or alteration

made in any of the property mentioned in the plaint, is held to be subject to the outcome of the First Appeal. Thus, in view of above, this Civil Application No. 2748 of 2002 is also hereby disposed of. E

25. For the reasons narrated hereinabove, the present application i.e. Civil Application No. 12644 of 1999, is hereby allowed and the Rule is made absolute accordingly. The application being Misc. Civil Application No. 2181 of 2003 filed by the defendant nos.12 and 13 stands hereby disposed of on account of the prayer made in the application and the orders passed therein on 16th January, 2004. Cost in cause.