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	7	7	25

IN THE COURT OF 6TH ADDITIONAL SENIOR CIVIL

JUDGE AT GANDHINAGAR

SPECIAL CIVIL SUIT No. 201 of 2010

Exh. 122

1. Thakore Mohanji Vithalji
aged adult, Hindu,
Occupation : Agriculture,
Residing at : Sola,
Taluka Daskroi,
District Ahmedabad.
2. Patel Aakashbhai Parsottambhai
aged adult, Hindu,
Occupation : Agriculture,
Residing at : Umreth,
Taluka & Dist. Ananad

... Plaintiffs

V E R S U S

Legal heirs of Jagannath Hiralal

1. Tailabkumar Jagannath
aged adult, Hindu,
Occupation : Agriculture,
Residing at : village Dabhoda,

Taluka & Dist. Gandhinagar

2. Savitaben Jagannath
aged adult, Hindu,
Occupation : Agriculture & Housewife,
Residing at : Aniyod,
Taluka Talod, Dist. Sabarkantha
3. Minakshiben Jagannath
aged adult, Hindu,
Occupation : Agriculture & Housewife,
Residing at : 6, Shrushti Residency,
Kamrej cross road, Surat
4. Suryaben Jagannath
aged adult, Hindu,
Occupation : Agriculture & Housewife,
Residing at : Dhanap,
Taluka & Dist. Gandhinagar
5. Pravinchandra Jagannath
aged adult, Hindu,
Occupation : Agriculture,
Residing at : village Dabhoda,
Taluka & Dist. Gandhinagar.
6. Vijay Dhirubhai Vaghasiya
aged adult, Hindu,
Occupation : Agriculture,
Residing at :
B/25, Danavpark Soc.,
Nikol village, Ahmedabad

... Defendants

SUIT VALUED AT RS. 86,38,060/- FOR CANCELLATION
OF AGREEMENT TO SELL AND SALE DEED AND SPECIFIC
PERFORMANCE OF AGREEMENT TO SELL

Appearance:-

Ld. Adv. Shri D.P.Patel for the plaintiffs

Ld. Adv. Shri P.V.Purabia for the defendants

Nos. 2,3 & 4

Ld. Adv. Shri D.A.Raval for defendant no.5

Ex-parte for defendants nos. 1 & 6

- : JUDGMENT :-

1. The short facts of the plaintiff's case are as under :-

1.1 That agricultural lands being survey no.454 ad measuring 1-31-54 hectors and survey no. 405/1 ad measuring 2-81-26 hectors situated at village Dabhoda, Taluka and District Gandhinagar (hereinafter will be referred to as suit lands) was of joint undivided ancestral lands of defendants nos. 1 to 5.

1.2 It is the case of the plaintiffs that the defendant no.1 has executed an agreement to sell dated 3.10.2008 in favour of the plaintiffs qua his undivided share in the suit lands for

Rs. 14,00,000/- and out of which the plaintiffs have paid Rs. 3,00,000/- as earnest money.

1.3 It is further the case of the plaintiffs that the defendants nos. 2 to 5 executed an agreement to sell dated 3.10.2008 in favour of the plaintiffs qua their share in the suit lands for Rs.55,00,000/- and out of which the plaintiffs have paid Rs. 15,00,000/- by way of earnest money.

1.4 It is the case of the plaintiffs, the defendants have to obtain title clearance certificate within 18 months of the date of agreements to sell which and the defendants have not acted as per the terms and conditions of the agreement to sell.

1.5 It is the case of the plaintiff that on 22.2.2010 the plaintiffs came to know that on 14.7.2009 the defendant no.1 has executed a registered agreement to sell no. 7101 in favour of the defendant no.6 qua his share from the suit lands. The plaintiffs also came to know that on 30.7.2009, the defendants nos.2 to 4 (through their Power of Attorney defendant no.6) have executed a registered sale deed no. 7828

of the whole suit land in favour of defendant no.6.

1.6 It is further pleaded by the plaintiffs that the plaintiffs were ready and are ready to perform their part of performance of the agreement to sell but the defendants nos. 1 to 5 were never ready and are not ready to perform their part of agreement to sell.

Hence this suit is filed for specific performance of the agreement to sell and for cancellation of the registered agreement to sell dated 14.7.2009 and the registered sale deed dated 30.7.2009.

2. Though the defendants Nos. 1 and 6 were served they failed to appear and hence this suit is ordered to be tried ex-parte against them. While the right of Written Statement of defendant no.5 was closed.

The defendants nos. 2 to 4 were duly served and they appeared and filed their Written Statement at Exh. 10, wherein it is pleaded as under :-

2.1 The defendants nos. 2 to 4 have mainly denied the pleadings of the suit plaint and mainly pleaded that the plaintiff has not acted as per the agreement to sell and not approached

them for payment of remaining amount of sale consideration as per the agreement to sell. It is also pleaded that the defendant no.6 has misused the Power of Attorney and executed a registered sale deed in his own favour. It is further pleaded that the defendants nos. 2 to 4 have not received any amount of sale consideration.

Pleading the above defense, the defendants have requested to dismiss this suit.

3. Following issues are framed at Ex- 30

- 1) Whether the plaintiff proves that the defendants Nos. 1 to 5 have entered into and agreement to sell in favour of the plaintiff of the suit property on 3.10.2008 ?
- 2) Whether the plaintiff proves that he has paid Rs. 18,00,000/- as earnest money to defendants nos. 1 to 5?
- 3) Whether the plaintiff is ready and willing to perform his part of the agreement to sell?
- 4) Whether the plaintiff proves that the defendants nos. 1 to 5 have not acted as per the agreements to sell ?
- 5) Whether the plaintiff proves that the registered agreement to sell No. 1701 and

registered sale deed no. 7828 in favour of the defendant no.6 are illegal ?

6) Whether the plaintiff is entitled to get the relief as prayed for ?

7) What order and decree ?

4. My findings on the above issues are as under :-

- (1) In partly affirmative
- (2) In negative
- (3) In negative
- (4) In negative
- (5) In negative
- (6) In negative
- (7) As per final order

5. The parties have produced the following documentary as well as oral evidence in support of their pleadings are as under :-

Plaintiff's side :-

Oral evidence

No.	Exh.	NAME OF WITNESS
1	43	Mohanji Vithalji - plaintiff no.2

Documentary evidence

No.	Exh.	DOCUMENTS
1	36	original agreement to sell dated 3.10.2008 executed by defendant no.1
2	37	original agreement to sell dated 3.10.2008 executed by defendants nos. 2 to 5
3	38	original receipts dated 3.10.2008
4	39	certified copies of village form no. 7 & 12 and village form no. 8-A
5	40,41	certified copies of the search reports dated 22.2.2010
6	42	certified copy of Entry No. 9682

After producing the affidavit of chief examination of the plaintiff no.2, the plaintiffs and their Advocate did not remained present hence the affidavit of chief examination of the plaintiff no.2 at Exh. 43 is ordered to be discarded and the right of the further evidence of the plaintiffs was closed.

Defendant's side :-

Since no evidence was produced on behalf of the defendants though sufficient opportunities were given the right of evidence of the defendants is closed.

6. Heard oral arguments on behalf of the plaintiffs. The right of arguments of the defendants was closed.

- : R E A S O N S :-

7. Issues No. 1 to 7 :-

The reasons, findings and outcome of all these issues are analogs to each other and therefore, to avoid the multiplicity of reasons and findings, these issues are decided together.

7.1 Having considered the above first of all if the documents produced by the plaintiffs are seen then if the original notarized agreement to sell dated 3.10.2008 produced at Exh. 36 is seen then as per the case of the plaintiffs, the said agreement to sell was executed by the defendant no.1 agreeing to sell the suit land qua his share to plaintiffs for Rs. 14,00,000/- and out of which the plaintiffs have paid Rs. 3,00,000/-. Now to prove that the plaintiffs have paid earnest money the plaintiffs have relied on one of the original receipt produced at Exh. 38 issued by defendant no.1. Now the period of above agreement to sell is of 18 months. One of the condition of the

above agreement to sell is that the defendant no.1 has to obtain Title clearance certificate and necessary permission within the said period and thereafter upon payment of the remaining amount of sale consideration, the defendant no.1 has to executed a registered sale deed in favour of the plaintiffs.

The above agreement to sell is a notarized agreement and without possession. The plaintiffs have not examined any of the witnesses of the said agreement to sell. Even the plaintiffs have not given any oral evidence to prove the contents of the above agreement. Hence it is evident that the plaintiffs have failed to prove that the above agreement and by that way failed to prove that the defendant no.1 has executed an agreement to sell in favour of the plaintiff.

7.2 Now if the original notarized agreement to sell dated 3.10.2008 produced at Exh. 37 is seen then the said agreement to sell was executed by the defendants nos. 2 to 5 agreeing to sell the whole suit land to plaintiffs for Rs. 55,00,000/- and out of which the plaintiffs have paid Rs. 15,00,000/-. Now to prove that the plaintiffs have paid earnest money the plaintiffs have relied on the original receipt

produced at Exh. 38. But if the total amount of receipts issued by defendants nos. 2 to 5 are seen then it comes to 12,50,000/- and no receipts are produced of the remaining amount of earnest money being paid.

Now the period of above agreement to sell is of 18 months. One of the condition of the above agreement to sell is that the defendants nos. 2 to 5 has to obtain Title clearance certificate and necessary permission within the said period and thereafter upon payment of the remaining amount of sale consideration, the defendants nos. 2 to 5 have to executed a registered sale deed in favour of the plaintiffs.

The above agreement to sell is a notarized agreement and without possession. The defendants nos. 2 to 4 have in their reply admitted the above agreement, but the defendant no.5 have not filed any reply. Hence so far as this agreement to sell executed by defendants nos. 2 to 5 can be said to be proved by the plaintiffs.

7.3 Now if the copy of the search reports produced at Exh. 40 and 41 are seen then it is evident that the defendant no.1 has executed and registered agreement to sell no. 7101 in favour

of the defendant no.6 agreeing to sell the suit land qua his share on 14.7.2009. It is also evident from the said search report that the defendants nos. 2 to 4 have given power of attorney to defendant no.6 of the suit land on 30.7.2009 and the defendant no.6 as a power of attorney holder of defendants nos. 2 to 4 have on 30.7.2009 executed a registered sale deed no. 7828 in favour of the defendant no.6 of the suit land. Necessary mutation entry no. 9682 was also carried out on 17.9.2009 of the above sale deed. But the said entry is not certified.

7.4 Now if the certified copies of the village form no. 7 & 12 and the copies of village form no. 8-A produced at Exh. 39 are seen then it is evident that the names of the defendants nos. 1 to 5 are going on in the suit land as on 23.4.2010.

7.5 From the above evidence it is evident that the period of 18 months of the above agreements to sell produced at Exh. 36 and 37 is already over. The plaintiffs have not issued any notice to the defendants nos. 1 to 5 to show that they are ready and willing to perform their part of performance by showing readiness to pay

the remaining amount of sale consideration as per the agreements to sell.

7.6 More so the plaintiffs have argued that the defendants have not cross examined the plaintiff no.2 and hence the facts stated in the affidavit of chief examination is required to be believed in Toto. But the fact remains that as the plaintiff no.2 did not remained present for cross examination, his affidavit of chief examination was discarded on 29.11.2017 and the right of further evidence of the plaintiffs was closed. Even the Advocate for the plaintiffs remained present subsequently and argued on behalf of the plaintiffs after verifying the record of the suit and still have not taken any steps to produce any oral evidence on behalf of the plaintiff.

Hence from the above it is evident that the plaintiffs have fail to prove their case by producing oral evidence of their documentary evidence.

7.7 The plaintiffs have relied on the judgment in the case of **Jaspal Kaur Cheema V/s. M/s. Industrial Trade Links reported in AIR 2017 SC 3995**, wherein it is held that "*If the defendants have not specifically denied or*

disputed statements made in the plaint, then it amounts to admission."

But in the present case the defendants nos. 2 to 4 have admitted the execution of agreement to sell by them and so far as defendant no.1 is concerned the suit is ordered to be tried *exparte* and defendant no.5 is concerned the right to file reply is closed. Hence there is no question of any specific denial. Therefore the above judgment is not applicable in the present case.

7.8 Reliance was also placed by the plaintiffs on the judgments in the case of **Union of India & Ors. V/s. S.H.Sarvendra** reported in AIR 2017 SC 3998 and in the case of **Mariamamma Itty & Anr. Vs/. K.J.Arbraham & Ors.** reported in 2017 AIR CC 5 (KER) and in the case of **Gangabhavani V/s. Rayapati Venkat Reddy** reported in AIR 2013 SC 3681 wherein mainly it is held that *"If the chief examination of witness is unchallenged in the cross examination then it has to be believed."*

But in the present case as discussed earlier the plaintiff no.2 did not remained present for cross examination and his affidavit of chief examination at Exh. 43 is discarded and the plaintiffs have not produced any other oral

evidence. Hence the above judgments are not applicable in the present case.

7.9 Reliance was also place on the judgment on behalf of the plaintiffs in the case of **Gopal Krishnaji Ketkar V/s. Mohamed Haji Latif & Ors. reported in AIR 1968 SC 1413.**

But the said judgment is on the point/aspect which is not relevant in this suit and hence as the said judgment is on different point it is not discussed here as not applicable.

7.10 Looking to the above, the plaintiffs have failed to prove that defendant no.1 have executed an agreement to sell in their favour but the plaintiffs have proved that the defendants nos. 2 to 5 have executed an agreement to sell in their favour. The plaintiffs have failed to prove that they have paid Rs. 18,00,000/- by way of earnest money. The plaintiffs have failed to prove that they are ready and willing to perform their part of the agreement to sell. The plaintiffs have also failed to prove that the defendants nos. 1 to 5 have not acted as per the agreements to sell. The plaintiffs have also failed to prove that the Registered agreement to sell no. 7101 and

registered sale deed no. 7828 in favour of the defendant no.6 are illegal.

In view of the above **the reply of issues nos. 1 is given in partly affirmative and the reply of issues nos. 2 to 5 are given in negative.** As the plaintiffs have failed to prove the issues nos.2 to 5 and partly prove the issue no.1, the plaintiffs are not entitled to get the relief as prayed for. Therefore the reply of **issue no.6 is given in negative** and the reply of **issue no. 7** is given by passing following order :-

- : ORDER :-

- The suit of the plaintiffs is hereby dismissed.
- Parties to bear their owns costs.
- Decree to be drawn accordingly.

Pronounced in the open Court on this 5th day of the month of March of the year 2018.

Date :- 05.03.2018

Place :- Gandhinagar

(Parimal Parsottambhai Patel)
6th Additional Senior Civil Judge,
Gandhinagar
Judge Code : GJ00942

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