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R.C.S No. 35/13

**In the Court of Additional Civil Judge, At
Dehgam.**

Plaintiffs :Zala

Shanaji Shakraji

Through its Power of Attorney

Rameshbhai Ramsinh Zala

Age. Adult, Res. At Zalana Muvada, Bahiyal,

Ta. Dehgam, dist. Gandhinagar

V/S

Defendants :(

1) Kamuben Widow of Shanaji Hothaji

(2) Mahobatsinh Khumaji Thakor

(3) Kalpeshji Shanaji Thakor Minor

through his Guardian Kamuben Widow of Shanaji Hothaji

(4) Vinaben Khumaji Thakor Minor

through his guardian Kamuben Widow of Shanaji Hothaji

All are residing at. Behind high school,

Dabhoda, Dist. Gandhinagar

(5) Amratben Balaji Thakor

(6) Nandiben Balaji Thakor

(7) Tinaben Balaji Thakor

(8) Baluben Widow of Babuji Balaji Thakor

(9) Minor Shilpaben through this Guardian

Baluben Widow of Babuji Thakor

(10) Minor Alkeshbhai Through his Guardian

Baluben Widow of Babuji Thakor

(11) Minor Shaileshbhai Through his guardian

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Baluben Widow of Babuji Thakor

Defendant No. 5 to 11 are residing at. Kharkhariya,

Ta. Dehgam, Dist. Gandhinagar

For Plaintiff :Ld.

Advocate Mr. J. K. Chauhan

For Defendant No. 1 & 4 :Ld.

Advocate Mr. A. K. Mansuri

Order Below Exh. 5

1. That present suit has been filed by the plaintiff for the specific performance of an agreement to sale as well as to get perpetual injunction against the defendants herein. That brief fact of the present suit are, plaintiff has filed the present suit as a power attorney holder of his grand father Shanaji Shakaraji. That agriculture land being Revenue survey No. 128 situated at. Bahiyal, Ta. Dehgam, Dist. Gandhinagar is running in the name of the defendants herein in the revenue record. That said property has been purchased by the plaintiff's grand father from the Deceased Shanaji Hothaji on 22/12/1995 by executing an agreement to sale and consideration price a sum of Rs. 1,00,001/(One lack one Rupees only/) was agreed amongst them, out of the said agreed amount a sum of Rs. 22,550/(Twenty two thousand five hundred and fifty Rupees only/) was paid by the plaintiff's grand father and the said agreement was executed in the presence of the Fulaben Hothaji, Shanaji Hothaji, Kamuben Shanaji. That description of the suit property has been described in Para No. 2 of the plaint and plaintiff has considered the same as a suit property (for the sack of convinience herein after called "Suit property"). That later on plaintiff has paid a sum of Rs. 67,871/(Sixty seven thousand eight hundred and seventy one rupees

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on 01/07/98. Hence, plaintiff has paid total sum of Rs. 90,421/(Ninety thousand four hundred and twenty one rupees Only/) out of an agreed consideration amount and the same was written on the stamp paper for the sum of Rs. 10/. Than after on 05/12/98 consideration amount was again fixed as a sum of Rs. 1, 26, 000/(One lack twenty thousand rupees only/) and out of the previous paid amount, it was agreed that remaining sum of Rs. 20,000/(Twenty thousand Rupees Only/) would be paid within three months and than sale deed would be executed on the payment of remainin amount. That said transaction was also written in the presence of the witnesses. That said remaining sum was paid to the defendants herein on 09/03/99 which was also agreed by the defendants herein. That plaintiff herein submitted that, the possession of the suit property was handed over to the plaintiff's grandfather at the time of execution of an agreement to sale. That since than plaintiff herein are in possession with the suit property. Moreover, plaintiff herein submitted that, as per an agreement to sale plaintiff has paid a total sum of Rs. 1, 20, 125/(One lack twenty thousand one hundred and twenty five Rupees only/) to the defendants herein and final sum of Rs. 5, 875/(Five thusand eight hundred and seventy five Rupees only/) was agreed to be paid at the time of execution of sale deed as well as it was also agreed that, sale deed shall be

executed after the suit property converted into an old tenure in the revenue record. Plaintiff herein further submitted that, since the execution of an agreement to sale plaintiff herein are in possession with the suit property and cultivating the same. Moreover, plaintiff herein further submitted that, plaintiff has made a several request to the defendants herein to muted the revenue record in their name as well as to convert the suit property into an old tenure, but defendants herein never coR.

C.S. No. 35/13 Order Below Exh.5 Page No. 3 operated. Finally defendants herein has converted the suit property into an old tenure which was not within the knowledge of the plaintiff's herein, which was also muted into the revenue record vide Entry No. 3740. That plaintiff herein has raised their objection against the said revenue entry No. 3740. Finally plaintiff has issued legal notice against the defendants herein on 23/03/2013 and requested them for the specific performance of an agreement to sale. That said notices has been served to the defendants herin but in spite of the same, defendants herein neither replied nor complied with the same. Hence, plaintiff has immediately filed the present suit for the specific performance of the said agreement as well as to get perpetual injunction against the defendants herein. That till the pendency of the present suit, in order to protect the suit property, plaintiff has filed the present application under the provison of O.39, R. 1 & 2 of C.P.C. That in the present

application
plaintiff has submitted that, plaintiff have a prima facie case; Balance of convenience is also in favor of the plaintiff and if injunction as sought for is not granted than plaintiff herein is likely to be caused with irreparable loss. Finally, plaintiff herein pray to allow the present application. That plaintiff has submitted documents vide list of documents Exh. 3 in support of the present application.

2. That defendnats herein has been dully served with the summons of the present suit as well as notice under the present application. But as intially no one appeared before this court, hence finally present suit was ordered to be proceed exparty against all the defendants herein. But later on Defendnat No. 1 to 4 appeared before this court through their Ld. Advocate and filed an application to set a side an order of exparty, which was allowed by this court. Than after Defendants No. 1 to 4 has R.C.S. No. 35/13 Order Below Exh.5 Page No. 4 been given sufficient opportunity to file their rely but they remain absolutely failed. Hence, finally their right to file their reply was order to be closed. Thus no reply has been filed by any defendants herein.

3. That during the pendency of the present application, plaintiff has filed an application vide Exh. 7 for the local inspecction of the suit property, which was allowed by this court. That court commissioner appointed by this court by virtue of an order passed below Ehx. 7 has conducted the local inspection as well as prepared scatch of the suit property which is

placed on record vide Mark 12/2 and 12/3.

4. That under the present application heard Ld. Advocate on both the side.

That considering the pleadings and documents produced on record as well as submissions on both the side, following issues has been raised before this court in order to decide the present application,
ISSUE

A) Whether plaintiff prove that, plaintiff have a prima facie case?

B) Whether plaintiff prove that, balance of convenience is also in favor of the plaintiff?

C) Whether plaintiff prove that, plaintiff is likely to be caused with irreparable loss if injunction as prayed for is not granted in favor?

D) What order

That answer of the above issues are as under,

A) "Affirmative"

B) "Affirmative"

C) "Affirmative"

D) "As per final order"

5. That reasons for the answer of the above issues are discussed and

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5.1) Issue No. A :That

plaintiff has filed the present application under the provision of O.39, R.1, 2 of C.P.C. It is therefore before determining

the present issue it is pertinent to discuss the settled principle of law so

far as the present provision is concern. That it is the settled principle of

law that, present provision is based on the principle of Equity, no parties

to any suit are entitle to get the relief under the present provision as a

matter of right. That relief under the present provision is purely within

the discretion of the court. In order to get the relief under

the present
 provision, concern party has to establish three basic
 criteria prima
 case
 case; balance of convenience and irreparable loss, based
 on his own
 pleadings and documents. Now, keep in mind the said
 settled principle
 of law, if present issue be determined than, in order to
 determine the
 prima facie case, documents produced by the plaintiff
 herein are
 important to be determined herein. That, first of all
 document vide Mark
 3/1 is the said power of attorney by virtue of which plaintiff
 has filed
 the present suit on behalf of his grand father. That as the
 defendants
 herein not challenged the said document, hence no reason
 appears to
 disbelieve the same. Moreover Document vide mark 3/7 is
 the main
 basis for the present suit. That present document is an
 agreement to sale
 executed in favor of the plaintiff's grand father, executed
 by the Shanaji
 Hothaji Solanki. That perusing the said document, it
 appears that
 present suit property was agreed to be sold to the
 plaintiff's grand father
 and consideration amount agreed was a sum of Rs. 1, 00,
 001/(
 One
 lack one rupees only)
 That, at the time of executing the said agreement,
 sum of Rs. 22, 550/(
 Twenty two thousand five hundred and fifty
 Rupees only/)
 was paid by the plaintiff's grand father as an earnest
 money. Hence, considering the present document it
 appears crystal clear
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 that, an agreement to sale the present suit property was

executed by an ancestor of the defendants herein in favor of the plaintiff's grand father on 22/12/95. But perusing the content of the said document it appears crystal clear that, no period has been fixed amongst the parties to the said document for the performance. Hence said document can be said to be without any period of limitation for the execution of the sale deed. But, perusing the second page of the said Document vide Mark 3/7, it appears that on 01/07/98 plaintiff's father has made total payment a sum of Rs. 90, 421/(Ninety thousand four hundred and twenty one Rupees only/)(Including previous payment) towards the said agreement and hand over the possession of the suit property to the plaintiff's grand father. Moreover, perusing the document vide Mark 3/8 it appears that, said document was written on 05/12/98 wherein consideration for the execution of the sale deed in respect to the present suit property was again agreed a sum of Rs. 1, 26, 000/(One lack twenty six thousand Rupees only/)
amongst the parties to an agreement vide Mark 3/7. That under the present document it was agreed that, out of an agreed consideration amount a sum of Rs. 1, 26, 000/(One lack twenty six thousand Rupees only/), a total sum of Rs. 1, 00, 125/(One lack one hundred and twenty five Rupees only/)
has been paid by the plaintiff's grand father to an ancestor of the defendants herein on

05/12/98 and it was further agreed that, out of remaining consideration amount a sum of Rs. 25, 875/, a sum of Rs. 20,000/would be paid within three month and remaining sum of Rs. 5,875 would be paid at the time of execution of the sale deed. Thus perusing the present document, it appears that it is in term of extension of conditions in respect to the previous agreement to sale amongst the same parties to an agreement vide Mark 3/7. That perusing the present document it R.C.S. No. 35/13 Order Below Exh.5 Page No. 7 appears that, period of limitation for the performance of the said agreement was agreed amongst the parties and it was agreed that, on the payment of the remaining consideration amount a sum of Rs. 5,875/sale deed would be executed. That considering all these document it appears crystal clear that, plaintiff's grand father has time by time make payment towards an agreement to sale as agreed amongst them. It also appears that, Plaintiff grand father has made a total payment a sum of Rs. 1,00,125/(One lack one hundred and twenty five rupees only/) out of an agreed consideration amount and obtained possession of the suit property since 1995. It is pertinent to note here that, defendants herein has been provided with sufficient opportunity to deny the pleadings of the plaint and put forward their respective defences by filling their reply. But in spite of the same, defendants herein remain failed to do so. Hence, while defendants herein

failed to deny the pleadings of the plaint as well as failed to submit their respective defences against the pleadings of the plaint. Hence, no reason appears on record to deny the pleadings & documents produced by the plaintiff herein. Hence, it appears crystal clear that, plaintiff herein succeed to prove on record the main basic fact with which plaintiff has filed the present suit. Moreover, perusing the document vide Mark 3/6 it appears crystal clear that, defendants herein has converted the suit property into an old tenure and the said entry was muted vide Entry No. 3740 on 27/02/2013. It is therefore plaintiff has filed their objection before the Mamlatdar Dehgam against the said entry No. 3840 on 20/03/2013. Not only that plaintiff herein has issued Legal notice through thier Ld. Advocate on 23/03/2013 to the defendants herein, wherein plaintiff has called upon the defendants herein to receive the remaining consideration amount a sum of Rs. 5,875/(Five thousand eight hundred and seventy five rupees only) and called them to execute a sale deed within the period of 15 days based on an agreement to sale, executed vide Mark 3/7. That considering the document vide Mark 3/12 to 3/17, it appears that said notice has been dully served to the defendants herein. But considering the whole record as the defendants herein has not complied with the said notice, it is therefore plaintiff has filed the present suit for the specific performance of the

said agreement
vide Mark 3/7. That considering the whole record it
appears crystal
clear that, pleadings of the plaint are absolutely corroborated
by the
documents submitted by the plaintiff himself vide list of
documents
Exh.3. That as the defendants herein in spite of having an
opportunity to
deny the pleadings of the plaint & submit their respective
defences by
filling their reply remain absolutely failed to do so, hence
no reason
appears to deny the facts as corroborated by the
documents vide list of
documents Exh.3. That considering the agreement vide
Mark 3/7 it
appears that said document is an unregistered document,
but as the
plaintiff has filed the present suit for the specific
performance of the said
agreement, hence by virtue of the Sec. 49 of The
Registration Act, 1908
it remains valid for the purpose of specific performance of
an agreement
to sale as well as it can be read in evidence for the
contract entered into
by the parties to the said agreement. Moreover
considering the version
of the document vide Mark 3/7 & 3/8 it appears crystal
clear that,
initially no specific period was agreed for the execution of
the sale
deed, but on 05/12/98 vide document Mark 3/8 it was
agreed amongst
the parties that, on the payment of remaining sum of Rs.
5,875/(
five
thousand eight hundred and seventy five rupees only//)
a sale deed
would be executed. Hence, it can be said that in the said
document vide
Mark 3/8 period of limitation for the performance of an

agreement was
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 agreed amongst the parties. Hence, finally plaintiff herein
 by showing
 readiness to perform his part of contract issued legal
 notice on 23/03/13
 vide Mark 3/11 and called upon the defendants herein to
 execute a sale
 deed, which was dully served to the defendants herein
 vide Mark 3/12
 to 3/17. But as the defendants herein failed to comply with
 the said
 notice hence ultimately plaintiff has filed the present suit
 immediately.
 Thus, present suit itself appears to be within the period of
 limitaion for
 the specific performance of an agreement vide Mark 3/7
 by virtue of Art.
 54 of The Limitation Act, 1963. Hence, considering the
 whole record
 and discusssions as made herein above, it apperas crystal
 clear that
 pleadings of the plaint as well as facts with which plaintiff
 has filed the
 present suit are absolutely corroborates and proved on
 record by
 plaintiff's own documents vide list of documents Exh.3.
 Hence,
 considering the disccussions as made herein above it
 appears crystal
 clear that, plaintiff herein remain succed to prove his
 prima facie case.
 Hence, considering the discussions as made herein above
 present **Issue**

No. A hereby answer in "**Affirmative**".

5.2) Issue No. B and C :That
 considering the discussions as made in
 Issue No. A as well as B and without prejudice with the
 same, if present
 both the issues be determined than it appears crystal clear
 that, plaintiff
 has absolutely complied with his part of contract and paid
 about 95%

agreed consideration amount to an ancestor of the defendants herein. That perusing the version of the document vide Mark 3/7 & 3/8 it has specifically agreed that, said agreement is even binding to thier legal heirs. Hence, absolutely said agreement are binding to the present defendants herein and as the plaintiff has complied with their part of contract and still showing his readiness to comply with his part of R.C.S. No. 35/13 Order Below Exh.5 Page No. 10 remaining terms, hence now it is being the duty of the defendants herein to casue performance of the said agreement on behalf of their ancestor by performing their part of contract. Though plaintiff are in possesion by virtue of the said agreement to sale and still in possession with the same, which fact has not been challanged or deny by the defendants herien, but still revenue record are running in the name of the defendants herein. As the plaintiff herein shown his readinees to perform his part of contract and defendants herein deny to perform thier part of contract and as the revenue record are still in the name of the defendants herein and if defendants herein would deal with the suit property by taking benifit of the revenue record than, certainly plaintiff herein would suffer hardship; certainly plaintiff herein would suffer heavey loss; certainly plaitiff herien would have to enter into the multiplicity of litigation like the present suit. Hence, considering all these aspects it appears crystal clear that, balance of convinience is certainly appears to be in favor of

the plaintiff herein and if the defendants herein not been further restrained from dealing with the suit property than, certainly plaintiff herein would be in a position of hardship and would be caused with irreparable loss. Hence, considering the discussions as made herein above, present both the issues hereby answer in **“Affirmative”**.

5.3) Issue No. D :That

considering the discussions as made in Issue No. A to C, it appears crystal clear that plaintiff herein succeed to prove the basic three elements of the O.39, R.1 and 2 of the C.P.C. Hence certainly plaintiff herein appears to be entitle for the relief under the present application. Before coming to the conclusion portion, it is hereby makes it clear that, all these observations has been made purely based on the pleadings and documents produced on record and it is made

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With this clarification, considering the discussions as made herein above this court

is of the certain view to pass the final order below the present

application as under,

FINAL ORDER

- i. Present application hereby order to be allowed.
- ii. Present Defendants hereby order to be restrained directly to indirectly, from interfering in possession of the plaintiff with respect to the suit property as well as restrain from dealing with (by any mode of transfer as envisaged by the Transfer of Property Act, 1882) the suit property till the final disposal of the

present
suit.

iii. No order as to cost.

Present order declared in the open court today on this
30th day of July, 2015.

Date :30/

07/15

Dehgam. _____

(Raja Ranchhodbhai Patel)

(Additional Civil Judge, Dehgam)

GJ00922

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