

**Special Civil Suit No. 33 of 2023****Order below Exhibit 5 :**

[01] This is a suit for the specific performance of the contract and for the declaration and for the injunction. The plaintiff has moved for the temporary injunction under Order 39 Rule 1 & 2 of CPC. The short facts of the application, in brief has been stated as under :

The properties, mentioned in the schedule, situated in the revenue estate of Village Jaspur, Ta. Kalol, District Gandhinagar are the subject of this present suit. For convenience of writing this order, the above stated properties are hereinafter shall be referred to as "**suit properties**".

**Schedule of properties**

<b>Sr. No.</b>	<b>Block / Survey No.</b>	<b>ad-measuring</b>
1.	239 paiki 3	0-54-63
2.	427	0-51-60
3.	479	0-48-56
4.	488	0-68-60

It is the case of the plaintiff that the defendant no(s). 1 & 2 wish to sell their land, both approached to the plaintiff and after negotiation the defendant no. 1 & 2 agreed to sell their share to the plaintiff. That Rs.1,42,50,000/- total sell consideration was decided and in this regard, the agreement to sell was executed on

31.08.2018. It is the case of the plaintiff that at the time of agreement to sell, the plaintiff had paid Rs.31,00,000/- (Rupees Thirty One Lakh Only) to the defendants in cash. The remaining balance consideration was decided to pay after permission of N.A. and after title clearance. That the plaintiff thereafter, several time requested for N. A. procedure, however, the defendant no. 1 & 2 did not pay attention towards the request of the plaintiff. Thereafter, the plaintiff came to know that the defendant no.1 & 2 are trying to sell their land to third party, therefore, the plaintiff has filed this present suit. It is stated by the plaintiff that the plaintiff has good *prima facie* case, the balance of convenience remains in favour of the plaintiff and if injunction not pass, then the plaintiff will suffered irreparable loss which cannot be compensated in terms of money.

[02] The defendant no. 1 & 2 have jointly filed their Written Statement at Exhibit 16, wherein they have denied the case of the plaintiff in *toto*. It has been stated that the suit of the plaintiff is false, frivolous and not maintainable at law. That the agreement to sell is a result of fraud and the defendant no.1 & 2 have never executed

any agreement to sell in favour of the plaintiff that the defendants have never received any amount of consideration. It is stated in the written statement that the defendant no.1 & 2 want to sell their land and in this regard one Nareshbhai Jashubhai Makwana approached to the defendants and the defendant no.1 & 2 have affixed their signatures in Consent Patrak (Sammati Patrak). That thereafter, the plaintiff has misused this signature and created forged documents of agreement to sell. In this regard, on 21.04.2023 the defendant no.1 has filed a complaint against the Nareshbhai Jashubhai Makwana, Thakor Kanuji Dahyaji, Desai Pintubhai Ishwarbhai etc. That the cause of action of filing the suit is false. That the plaintiff has no *prima facie* case. That the plaintiff is not entitled to get any relief. The defendants have prayed for the rejection of an application under Order 39 Rule 1 & 2.

[03] It is well settled proposition of law that for injunction, the plaintiff has to establish his strong *prima facie* case. The plaintiff has to come with clean hand. It is also settled that no injunction can be granted in favour of a party who suppressed material facts. Keeping in mind, above stated settled principles, if we perused the

documentary evidence produced by the plaintiff, it appears that the plaintiff has produced two documents in support of his case. The plaintiff has produced abstract of village form no. 7 at Mark-3/1. The plaintiff has produced copy of agreement to sell at Mark-3/2. Now, it is the case of the plaintiff that he has paid Rs.31,00,000/- (Rupees Thirty One Lakh Only) in cash. No any concrete material has been produced by the plaintiff to show that he has in fact paid such huge amount. The plaintiff has not produced any receipt of payment of consideration. The defendant has seriously disputed the facts with regard to execution of agreement to sell and payment of consideration. It is highly unnatural that the person who paid Rs.31,00,000/- (Rupees Thirty One Lakh Only) and did not received any receipt for the payment.

[04] In *Harshadkumar Kantilal Bhalodwala Vs. Ishwarbhai Chandubhai Patel & Others, 2009, Law Suit ( Gujarat ) 937*, the Hon'ble High Court of Gujarat has held as under:

**Head Note: Civil Procedure Code 1908 Order 39 Rule 01 & 02 Initial burden to prima facie prove such payment which is alleged to have been paid by cash is upon the**

plaintiff who asserts that the said amount is paid by him. The plaintiff has not produced anything to show that, he has withdrawn the said amount from any bank account or borrowed the money from anyone, he couldn't point out any corresponding evidence like income-tax return or the bank pass book etc. therefore, the balance of convenience can be said to be in favour of bona fide purchaser i.e. defendant no.3 & 4 impugned order set-aside.

6. Heard the learned Advocates appearing on behalf of the respective parties at length. At the outset, it is required to be noted that the respondent No. 1 original plaintiff has instituted the suit for cancellation of registered sale-deed dated 15.05.2007 executed by the original defendant Nos. 1 and 2 (original owners) in favour of the original defendant Nos. 3 and 4 (appellants herein). He has also filed suit for specific performance of the agreement to sell dated 16.01.2006 (20.01.2006) alleged to have been executed by the original defendant Nos. 1 and 2. It is the contention on behalf of the appellants that he has paid Rs.4,50,000/-

by way of part sale consideration to the defendant Nos. 1 and 2 at the time of execution of alleged agreement to sell dated 16.01.2006. It is to be noted that the original defendant Nos. 1 and 2 have specifically disputed the execution of the agreement to sell dated 16.01.2006 as well as receipt of Rs.4,50,000/- alleged to have been paid by cash. Therefore, once the execution of the agreement to sell is disputed and even the receipt of the part sale consideration which is alleged to have been paid by cash is disputed, in that case, initial burden to *prima facie* prove such payment which is alleged to have been paid by cash is upon the plaintiff who asserts that the said amount is paid by him. As held by the learned Single Judge in the case of Khimjibhai Harjivanbhai Patadia (supra) when the factum of payment of part sale consideration which has been alleged to have been paid by cash is seriously disputed in that case, the plaintiff is required to produce some evidence to show that whether he has withdrawn the said amount from any Bank account or he has borrowed from any one. In the present case, the

plaintiff has not produced anything to show that while making the payment of Rs.4,50,000/- as alleged, he has withdrawn the said amount from any Bank account or he has borrowed the money from any one. Learned Advocate for the original **plaintiff is not in a position to point out any corresponding documentary evidence in the form of income tax return or the Bank passbook etc.** Therefore, the original plaintiffs has prima facie failed to prove and/or establish the payment of Rs.4,50,000/- by way of part sale consideration.

7. On considering the impugned order passed by the learned trial Court allowing application Exh. 5, it appears that solely relying upon the alleged agreement to sell dated 16.01.2006 (20.01.2006), which is specifically disputed by the executant, learned Judge has held that there is a *prima facie* case in favour of the plaintiffs, and accordingly, observed that the balance of convenience as well as irreparable loss would be in favour of the original plaintiffs. **It is to be noted that original defendant Nos. 3 and 4 have purchased the property by registered sale-deed after the original land**

owners gave public notice in the local newspaper intending to sell the land in question and when no objections were submitted by anybody inclusive of the plaintiffs, the original defendant Nos. 3 and 4 have purchased the property on payment of full sale consideration. Under the circumstances, it can be said that the original defendant Nos. 3 and 4 are the bona fide purchasers of the land in question on payment of full sale consideration. In view of such a situation, the balance of convenience can be said to be in favour of bona fide purchaser i.e. defendant Nos. 3 and 4. Nothing is on record that original plaintiffs had submitted any objection pursuant to the public notice/advertisement in the local newspaper given by the original landowners intending to sell the land in question. Under the circumstances, the learned trial Court has materially erred in holding the prima facie case as well as the balance of convenience in favour of the original plaintiffs. As such on considering the entire order passed by the learned trial Court, the learned Judge has not assigned any reason how the balance of

convenience would be in favour of the original plaintiffs. As stated above, solely relying upon the alleged agreement to sell dated 16.01.2006 (20.01.2006), which has been seriously disputed, the learned Judge has observed that there is a *prima facie* case and balance of convenience in favour of the plaintiffs. It cannot be disputed that while considering the application for injunction under Order 39, Rules 1 and 2 Code of Civil Procedure, Court is required to consider the three aspects i.e. (i) *prima facie* case, (ii) balance of convenience (iii) irreparable loss in terms money if the injunction as prayed for is not granted. While granting the injunction all the three aforesaid conditions are to be satisfied. Even if there is *prima facie* case in favour of the plaintiffs but the balance of convenience is not in favour of plaintiffs and/or **if it is found that the plaintiff can be compensated in terms of money even if the injunction is not granted**, the Court may not grant even interim injunction. In the present case, the learned Judge has not considered the aforesaid aspects more particularly, with respect to balance of convenience

and the irreparable loss in terms of money if the interim injunction as prayed is not granted.

8. It is to be noted that in the alternative the prayer of the plaintiffs is against the defendant Nos. 1 and 2 for return of Rs. 4,50,000/- with interest. Thus, it appears that if the interim injunction as prayed for is not granted in that case, alternative prayer of the plaintiffs for a decree of Rs.4,50,000/- with interest can be considered at the time of trial. Under the circumstances, the Ld. judge has not considered the relevant aspect while granting injunction.

10. In a view of the above and for the reasons stated above, impugned order passed by the ld. trial court allowing Exhibit 05 application is deserves to be quashed and set-aside and is hereby quashed and set-aside. However, it goes without saying that in a view of the pendency of the suit still the principles of lis pendency will always be applicable. Accordingly appeal from order is allowed.

[05] In *Khimjibhai Harjivanbhai Patadiya Vs. Patel Govindbhai Bhagwanbhai, 2006, 4 GLR 3058*, the Hon'ble High Court of Gujarat has held as under :

11. Mr. Kavina is also not in a position to point out that till the public notice was issued, whether his client had ever tried to enter into any correspondence with defendant No. 1 or has ever tried to pursue his contractual rights in any manner. Even when the factum about payment of Rs. 25 Lacs is seriously disputed by defendant No. 1 on the ground that a forged thumb impression is taken on a stamp paper, the plaintiff has not even produced prima facie evidence to show as to in which manner he has paid Rs. 25 Lacs. The plaintiff has not produced anything to show that whether he has withdrawn said amount from any bank account or he has borrowed money from anyone. Mr. Kavina is also not in a position to point out as to in which manner, his client has paid the aforesaid amount and even **if it is paid by cash, no corresponding documentary evidence in the form of income tax return is finding place on record in connection with such**

**payment. Therefore, it can safely be presumed that the theory of socalled payment is not at all believable.**

15. Considering the aforesaid aspect of the matter, in my view, the trial Court was perfectly justified in refusing to grant discretionary order of injunction under Order 39 of C.P.C. The facts of the case would indicate that the plaintiff has filed the suit only with a view to blackmail the defendants or bona fide purchasers, as part of the land is now allotted to various purchasers by plotting the same. At this stage, Mr. Kavina submitted that, at least, for part of the land injunction may be granted, however, this is not a case in which any discretionary order under Order 39 of C.P.C., can be granted to assist such plaintiff, who has instituted the suit absolutely without any basis and only with an object to get something out of nothing. be disputed that while considering the application for injunction under Order 39, Rules 1 and 2 Code of Civil Procedure, Court is required to consider the three aspects i.e. (i) *prima facie* case, (ii) balance of convenience (iii) irreparable loss in terms money if the

injunction as prayed for is not granted. While granting the injunction all the three aforesaid conditions are to be satisfied. Even if there is *prima facie* case in favour of the plaintiffs but the balance of convenience is not in favour of plaintiffs and/or **if it is found that the plaintiff can be compensated in terms of money even if the injunction is not granted**, the Court may not grant even interim injunction. In the present case, the learned Judge has not considered the aforesaid aspects more particularly, with respect to balance of convenience and the irreparable loss in terms of money if the interim injunction as prayed is not granted.

8. It is to be noted that in the alternative the prayer of the plaintiffs is against the defendant Nos. 1 and 2 for return of Rs. 4,50,000/- with interest. Thus, it appears that if the interim injunction as prayed for is not granted in that case, alternative prayer of the plaintiffs for a decree of Rs.4,50,000/- with interest can be considered at the time of trial. Under the circumstances, the ld. judge has not considered the relevant aspect while granting injunction.

10. In a view of the above and for the reasons stated above, impugned order passed by the Id. trial court allowing Exh.05 application is deserves to be quashed and set-aside and is hereby quashed and set-aside. However, it goes without saying that in a view of the pendency of the suit still the principles of *lis pendence* will always be applicable. Accordingly appeal from order is allowed.

[06] The ratio laid down in the afore stated case law is squarely applicable to the case in hand. By the Hon'ble High Court of Gujarat, it is held in clear terms that when the factum of payment of part sale consideration which has been alleged to have been paid by cash is seriously disputed in that case, the plaintiff is required to produce some evidence to show that whether he has withdrawn the said amount from any Bank account or he has borrowed from any one. Here in the case on hand, the defendants have seriously disputed the execution of agreement to sell and payment of consideration. Therefore, the burden heavily fall on the shoulder of the plaintiff to produced *prima facie* material which can establish the facts with regard to the payment of consideration. No any single evidence has been produced by the

plaintiff to show that the consideration was infect paid by the plaintiff. In the case of *Ambalal Sarabhai Enterprise Vs. K. S. Infraspac LLP Ltd., Civil Appeal No.9346/2019*, it has been held that in the suit for the specific performance the plaintiff have to establish a strong *prima facie* case on basis of undisputed facts. It is also held that the conduct of the plaintiff will also be a very relevant consideration for the injunction. In the case on hand, the plaintiff is not able to show his *prima facie* case on basis of undisputed facts. Further, the conduct of the plaintiff with regard to payment of huge amount in cash and not producing any receipt is highly doubtful. Therefore, in the peculiar facts and circumstances of the case, it cannot be said that the plaintiff has good and strong *prima facie* case. The plaintiff, therefore not entitled to get any discretionary relief admissible under Order 39 Rule 1 & 2. Hence, following order is passed in the interest of Justice.

**// ORDER //**

- **The application stand dismissed.**
- **Cost shall follow the final out come of the suit.**

**Order Sign & Pronounce in the open Court on 22<sup>nd</sup> July, 2024.**

<p>Date : 22.07.2024. Place : Kalol.</p>	<p><b>( Ashishkumar Naginbhai Patel )</b> <b>Principal Senior Civil Judge,</b> At. Kalol @ Gandhinagar. <b>UIC No. GJ 00935</b></p>
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