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Duration: 14 Years, 02 Months, 28 days.
Exh.: 105.

**IN THE COURT OF PRINCIPAL SENIOR CIVIL JUDGE
AND A.C.J.M., MUNDRA, DISTRICT : KACHCHH.**

**SPECIAL CIVIL SUIT No.40 of 2017.
(Old Special Civil Suit No.15 of 2012)**

***(Maheshwari) Juma Vira Harijan,**
Aged 70 years, Occupation: Agriculture,
Having address at Kara Ghogha,
Taluka Mundra, Dist.Kachchh.

*Died during the pendency of the suit, his heirs:-

1. **Bhimji Juma Harijan,**
Aged Adult, Occupation: Agriculture,
Village Kara Ghogha, Mundra-Kachchh.
2. Heirs of deceased **Mohan Juma Harijan,**
 - 2/1. **Nanbai Mohan Harijan,**
Aged Adult, Occupation: Agriculture,
Village Kara Ghogha, Mundra-Kachchh.
 - 2/2. **Chandni Mohan Harijan,**
Aged Adult, Occupation: Agriculture,
Village Kara Ghogha, Mundra-Kachchh.
 - 2/3. **Hansa Mohan Harijan,**
Aged Adult, Occupation: Agriculture,
Village Kara Ghogha, Mundra-Kachchh.
3. **Valji Juma Harijan,**
Aged adult, Occupation: Agriculture,
Village Kara Ghogha, Taluka Mundra-Kachchh.
4. **Gopal Juma Harijan,**
Aged adult, Occupation: Agriculture,
Village Kara Ghogha, Taluka Mundra-Kachchh.

...Plaintiff.

V e r s u s

1. **Shah Maniben Jethalal Chapshi,**
Aged 85 years, Occupation: Agriculture,
Village Punadi, Taluka Mandvi, Dist. Kachchh.

2. **Shah Harakhchand Jethalal Chapshi**,
Aged 58 years, Occupation: Agriculture,
Village Punadi, Taluka Mandvi, Dist. Kachchh.
3. **Shah Taraben Jethalal Chapshi**,
wife of Jadavji Khimji Shah,
Aged 55 years, Occupation: Agriculture,
Village Vandh, Taluka Mandvi, Dist. Kachchh.
4. **Shah Chandanben Jethalal Chapshi**,
wife of Shantilal Rambhiya,
Aged 52 years, Occupation: Agriculture,
Village Ramaniya, Taluka Mundra, Dist. Kachchh.
5. **Shah Paresh Jethalal Chapshi**,
Aged 49 years, Occupation: Agriculture,
Village Punadi, Taluka Mandvi, Dist. Kachchh.
6. **Shah Kasturben Jethalal Chapshi**,
Aged 47 years, Occupation: Agriculture,
Village Punadi, Taluka Mandvi, Dist. Kachchh.
7. **Manubha Karshanji Sodha**,
Aged 62 years, Occupation: Agriculture,
Village Sama Ghogha,
Taluka Mundra, Dist. Kachchh.

...Defendants.

Appearance:

Mr.K.K.Gadhvi, learned advocate for the plaintiff.

Mr.P.D.Jadeja, learned advocate for the defendant Nos.1-2.

Mr.G.K.Jadeja, learned advocate for the defendant Nos.3 to 7.

Sub: Suit for Specific Performance of Contract, Cancellation of sale-deed, Declaration and *Perpetual Injunction*.

:: J U D G M E N T ::

1. Initially, the present suit was instituted as the Special Civil Suit No.15 of 2012 in the Court of Principal Senior Civil

Judge, Bhuj-Kachchh. However, thereafter, in the year 2017, as the Senior Civil Court has been established at Mundra and as the subject-matter of the present suit is situated within the territorial jurisdiction of Taluka Mundra, the present suit has been transferred to this Court by the administrative orders of Hon'ble the Principal District Judge, Kachchh at Bhuj, and the same has been re-registered and numbered as the Special Civil Suit No.40 of 2017, and proceeded further in accordance with law.

2. The plaintiff has instituted the present suit against the defendants, for specific performance of contract, cancellation of sale-deed, declaration and *perpetual* injunction. The brief facts of the plaintiff's case as stated in the plaint, are as under:

2.1 Agriculture land bearing Revenue Survey No.233/1 Hectors-Are-Sq.Mtrs. 1-43-63 of village Beraja, Taluka Mundra ("**the suit-land" for short**), was of the ownership of Shah Jethalal Chapshi. The defendant No.1 is the widow, whereas the defendant Nos.2 to 6 are the children of said Shah Jethalal Chapshi.

2.2 It is the case of the plaintiff that on 23.12.2010, the plaintiff entered into a sale-agreement in respect of suit-land with the defendant Nos.1 to 6; that the sale-consideration of the suit-land was fixed at Rs.7,98,000/-; that out of the said sale-consideration, the plaintiff paid Rs.1,25,000/- to the defendant Nos.1 to 6 as an earnest money, at the time of execution of the said sale-agreement. It is further case of the plaintiff that it was agreed by and between the parties that the plaintiff was to pay the remaining sale-consideration to the defendant Nos.1 to 6 within three months i.e. on or before 21.03.2011. It is further case of the

plaintiff that it was also agreed by and between the parties that the defendant Nos.1 to 6 were to get their names entered in the revenue record, and until the said exercise was completed, the agreement would not be barred by limitation.

2.3 It is further case of the plaintiff that it was also agreed by and between the parties that the title of the suit-land is clear and marketable, however in the event of any objection or error of record, it would be the duty of the defendant Nos.1 to 6 to get the title of the suit-land cleared, and till that time, the sale-agreement would remain in force.

2.4 It is further case of the plaintiffs that the defendant Nos.1 to 6, after getting their names entered and certified in the revenue records on 11.03.2011, supplied to the plaintiff the revenue records of the suit-land, including entry no. 2870 on 21.03.2011. However, on perusal of the said revenue records, the plaintiff found that in the column of other rights, the right to release the mortgage of one Gardas Vaghji was found. Therefore, the plaintiff called upon the defendant Nos.1 to 6 to get removed such right of Gardas Vaghji, and thereafter, the plaintiff would pay the remaining sale-consideration. However, the defendant Nos.1 to 6 did not pay any heed to it. Thereafter, on 21.03.2011, the plaintiff issued a legal notice through his advocate Mr.Mithun S. Pujara to the defendant Nos.1 to 6, calling upon them for specific performance of contract entered into by and between them. On 25.03.2011, the defendant Nos.1 to 6 gave evasive reply through their advocate Mr.P.D.Jadeja, and thereafter, on 03.04.2011, the defendant Nos.1 to 6 issued a public notice in the local daily newspaper "*Kutch Mitra*", and thereby, terminated the

sale-agreement. Therefore, on 06.04.2011, the plaintiff also got issued a public notice in the local daily newspaper "*Kutch Mitra*", declaring that the said sale-agreement is in force, and that the plaintiff is ready and willing to perform his part of contract, but it was the defendant Nos.1 to 6 who have not got the title of the suit-land cleared. Therefore, by the said notice, the plaintiff cautioned the public not to enter into any transaction with the defendant Nos.1 to 6 in respect of the suit-land. Not only that, the plaintiff also sent a fresh notice to the defendant Nos.1 to 6, stating the said facts.

2.5 Thereafter, the defendant Nos.1 to 6 again replied the said notice on 15.06.2011. Thereafter, again on 17.08.2011, the plaintiff called upon the defendant Nos.1 to 6 to get removed the revenue entry regarding mortgage, from the revenue records, and stated that thereafter, the plaintiff would immediately pay the remaining sale-consideration to the defendant Nos.1 to 6. However, instead of acting upon the said notice, the defendant Nos.1 to 6 sold the suit-land to the defendant No.7, by executing the registered sale-deed No.7876, dated 2.11.2011. Thus, though the sale-agreement was in existence, instead of performing their part of contract, the defendant Nos.1 to 6 committed the breach, and sold the suit-land to the defendant No.7, by executing the registered sale-deed. Therefore, the plaintiff has been constrained to file this suit.

3. On being served with the summons of the present suit, the defendant Nos.1 to 6 appeared through their advocate, and contested the present suit, by filing the Written Statement at Exh.22. In the Written Statement, the defendant Nos.1 to 6

denied all the averments and allegations made in the plaint. It is stated that the defendant Nos.1 to 6 have never refused to specifically perform the sale-agreement, but it was the plaintiff-himself who has not performed his part of contract. It is also stated that the plaintiff has filed this suit to extract money from the defendant Nos.1 to 6. It is also stated that the plaintiff has not challenged the revenue record. They further stated that they have legally sold and transferred the suit-land to the defendant No.7, by registered sale-deed, after accepting the sale-consideration. It is stated that the plaintiff's notice has been replied by them on 25.03.2011. It is further stated that as agreed in the sale-agreement, the succession entry No.2870 has been made, and the same has also been certified. However, the disputes raised in the present suit, were never raised by the plaintiff at that time. At the relevant time also, the title of the suit-land was clear and marketable, and no any objections were raised. However, the plaintiff gave false legal notice to them. In fact, at the relevant time, the defendant Nos.1 to 6 were ready and willing to execute the sale-deed in favour of the plaintiff, but it was the plaintiff who failed to pay the remaining sale-consideration within the time-limit of seven days as agreed, and therefore, the sale-deed could not be executed in favour of the plaintiff. Though the plaintiff is well-aware about all these facts, the plaintiff has deliberately remained silent. Thereafter, on 02.06.2011, the defendant Nos.1 to 6 have legally terminated the sale-agreement. Thereafter, the proposed purchaser of the suit-land invited the objections, by publishing a public notice in the local daily newspaper on 20.09.2011, however no any objections were

received, and therefore, the defendant Nos.1 to 6 sold/transferred the suit-land to the defendant No.7, by registered sale-deed. Therefore, according to the defendant Nos.1 to 6, the plaintiff has not come before this Court with clean hands. The execution of the sale-agreement is not in dispute, but since the plaintiff-himself has failed to act upon the said sale-agreement, the plaintiff has filed this false suit to extract money from the defendant No.7. It is further case of the defendant Nos.1 to 6 that the name of the defendant No.7 has already been entered in the revenue record and the same has been certified on the basis of the registered sale-deed; that no cause of action has arisen for the plaintiff to file this suit. Therefore, this suit may be dismissed with costs.

4. The defendant No.7 appeared through his advocate, and contested the present suit, by filing the Written Statement at Exh.17. In the Written Statement, the defendant No.7 denied all the averments and allegations made against him in the plaint. It is stated that the plaintiff's suit is time-bared. It is further stated that the defendant No.7 has purchased the suit-land from the defendant Nos.1 to 6, after paying full consideration, after verifying the revenue records and after publishing the notice in the newspaper, inviting objections, however no any objections were raised by the plaintiff. Thus, the defendant No.7 is a *bona fide* purchaser for a valuable consideration without notice. It is further stated that the defendant No.7 has become the owner and occupier of the suit-land by virtue of a registered sale-deed, and his name has been mutated in the revenue record *vide* entry No.3043. It is further stated that the plaintiff and the defendant Nos.1 to 6 are in collusion with one another, and they have

fabricated the sale-agreement. The said sale-agreement is unregistered, and therefore, cannot be specifically enforced. With these averments, the defendant No.7 prayed for the dismissal of the present suit with costs.

5. At the time of filing this suit, the plaintiff had moved an application at Exh.5, seeking temporary injunction, to restrain the defendants from further transferring the suit-land. However, after hearing the learned advocates for both the sides, my learned predecessor Judge, by his order dated 10.10.2013, was pleased to dismiss the said application.

6. From the pleadings of the parties, following Issues have been framed by my learned predecessor Judge, at Exh.38:

૧. શું વાદી સાબીત કરે છે કે, ગામ: બેરાજા, તા: મુંદરા-કચ્છના રે.સર્વે નં.૨૩૩/૧ વાળી "સુરઘ" નામના ખેતરની જમીન હે.આરે.૧-૪૩-૬૩ ની પ્રતિવાદી નં.૧ થી ડનાએ વાદીને રૂ.૭,૯૮,૦૦૦/-માં વેંચવાનું નક્કી કરી સાટા ખત કરી આપેલ છે? ("હકાર"માં)

[1. *Whether the plaintiff proves that the defendant Nos.1 to 6 agreed to sell the suit-land to the plaintiff for a sale-consideration of Rs.7,98,000/- and executed the sale-agreement? (In the affirmative)]*

૨. શું વાદી સાબીત કરે છે કે, પ્રતિવાદી નં.૧ થી ડનાએ સાટા કરારનું પાલન કરેલ નથી? ("નકાર"માં)

[2. *Whether the plaintiff proves that the defendant Nos.1 to 6 have not specifically performed the sale-agreement? (In the negative)]*

૩. શું વાદી સાબીત કરે છે કે, પ્રતિવાદી નં.૧ થી ડનાએ પ્રતિવાદી નં.૭ને સદર વાદગ્રસ્ત મિલકત ગેરકાયદેસર રીતે વેંચાણ આપેલ છે? ("નકાર"માં)

[3. *Whether the plaintiff proves that the defendant Nos.1 to 6 have illegally sold the suit-land to the defendant No.7? (In the negative)]*

૪. શું પ્રતિવાદી નં.૭ સાબીત કરે છે કે, તેઓ વાદગ્રસ્ત મિલકતનાં બોનાફાઈડ પરચેઝર છે? ("હકાર"માં)

[4. Whether the defendant No.7 proves that he is a bona fide purchaser of the suit-land? **(In the affirmative)**]

૫. શું પ્રતિવાદી નં.૧ થી ૬ પુરવાર કરે છે કે, તેઓ વાદગ્રસ્ત મિલ્કતનો દસ્તાવેજ બનાવી આપવા તૈયાર અને ખુશી હોવા છતાં વાદીએ સમયમર્યાદા (દિન-૭)માં અવેજની રકમ ચુકવેલ નહીં અને રજીસ્ટર્ડ દસ્તાવેજ કરવામાં આવેલ નહીં? ('હકાર'માં)

[5. Whether the defendant Nos.1 to 6 prove that though they were ready and willing to execute the sale-deed, the plaintiff failed to make the payment of remaining sale-consideration within time-limit (seven days), and therefore, they could not execute the sale-deed? **(In the affirmative)**]

૬. શું વાદી માંગ્યા મુજબની દાદ મેળવવા હકકદાર છે? ('નકાર'માં)

[6. Whether the plaintiff is entitled to get the reliefs, as prayed for? **(In the negative)**]

૭. શું હુકમ અને હુકમનામું? (આખરી હુકમ મુજબ)

[7. What order and decree? **(As per final order)**]

:: REASONS ::

7. Thereafter, the plaintiff adduced following evidence:

Oral Evidence:

Sr. No.	Names of the witness(es)	Exh.
1.	Affidavit of the plaintiff - (Maheshwari) Juma Vira Harijan, in lieu of examination-in-chief, under Order XVIII Rule 4 of the Code of Civil Procedure, 1908 ("the Code" for short).	56
2.	Affidavit of the PW-2 Maheshwari Pachan Daya, in lieu of examination-in-chief, under Order XVIII Rule 4 of the Code.	91

Documentary Evidence:

Sr. No.	Description of the documents.	Exh.
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1.	Original sale-agreement, dated 23.12.2010.	62
2.	Village Form No.7/12 of Village Beraja, Revenue Survey No.233/1, of dated 21.03.2011.	63
3.	Village Form No.8, Khata No.197 of Village Beraja.	64
4.	Village Form No.6 Entry No.2870.	65
5.	Legal notice dated 21.03.2011 through the plaintiff's advocate to the defendant Nos.1 to 6.	66
6.	Regd. A.D. Acknowledgement Slip, dtd.22.03.2011.	67
7.	Reply dated 25.03.2011 of the notice, given by the defendant's advocate to the plaintiff.	68
8.	Public notice dated 06.04.2011 by the plaintiff's advocate.	69
9.	Reply dated 07.04.2011 to the public notice, given by the plaintiff's advocate.	70
10.	Regd. A.D. Acknowledgement Slip, dtd. 07.04.2011.	71
11.	Reply dated 15.06.2011 given by the defendant's advocate to the plaintiff's advocate.	72
12.	Counter-reply-cum-notice dated 17.08.2011 given by the plaintiff's advocate to the defendant's advocate.	73
13.	Receipt dtd. 20.08.2011 regarding payment of postal charges.	74
14.	Regd. A.D. Acknowledgement Slip, dtd. 20.08.2011.	75
15.	Certified copy of the sale-deed No.7876/2011, dated 02.11.2011 executed by the defendant Nos.1 to 6 in favour of the defendant No.7.	76

8. The defendants-side adduced following evidence:

Oral Evidence:

Sr. No.	Names of the witness(es)	Exh.
1.	Affidavit of the defendant No.2 Harakhchand Jethalal Shah for himself and as the PoA of the defendant Nos.1 & 3 to 6, in lieu of examination-in-chief, under Order XVIII Rule 4 of the Code.	94

Documentary Evidence:

Sr. No.	Description of the documents.	Exh.
1.	Death certificate of the defendant No.1 - Maniben Jethalal Chheda.	98
2.	General Power of Attorney dated 29.02.2012 given by the defendant Nos.1 & 3 to 6 to the defendant No.2.	99

9. In order to prove his case, the plaintiff (Maheshwari) Juma Vira Harijan has filed his affidavit under Order XVIII Rule 4 of the Code, in lieu of examination-in-chief, at Exh. 56, and thereby, he has reiterated the averments of the plaint, on oath.

9.1 In the cross-examination on behalf of the defendant Nos.1 to 6, the PW-1 (Maheshwari) Juma Vira Harijan stated that he has been doing agriculture work since last 12-13 years. He has no other occupation, except agriculture. He himself cultivates the land, and also gets it cultivated through his persons. He is having one field. The said field is ad measuring about 10 Acres. He is taking crops of about Rs.1,00,000/-, for which, he spends about Rs.50,000/-. Out of agriculture, he maintains himself and his wife. He is having two bank accounts. He has withdrawn the money deposited by the Government in his account towards the crops.

9.2 He further stated that at that time when he entered into the sale-agreement, he was having Rupees two to three lakh in his bank account. At present, he does not have any document to show that he was having bank balance of Rupees two to three Lakh in his account at that time. He stated that he is ready to

produce his bank passbook.

9.3 He stated that he is not literate, however he puts his signature. He stated that he has got prepared this sale-agreement from advocate Shri Khojabhai. He admitted that he was read over the contents of the sale-agreement. He admitted that the succession entry was not certified.

9.4 He pleaded ignorance that the succession entry was already certified twenty days prior to the date of expiry of the sale-agreement. He admitted that the said succession entry has been produced on the record of this suit. He admitted that no any objections were received pertaining to the title of the suit-land. He admitted that when he entered into the sale-agreement, the succession entry was not certified, and except that, the title of the suit-land was clear.

9.5 He pleaded ignorance that there was any condition in the sale-agreement with regard to cancellation of entry relating to release of the mortgage. He does not remember whether he had got published the public notice through advocate Mr.Mithun Pujara. He denied that the defendant Nos.1 to 6 gave reply on 21.03.2011 to his notice. He denied that though he has received the reply, he is stating false fact on oath regarding not having received the said reply. He denied that as per the sale-agreement, on payment of the remaining sale-consideration, the defendants were ready to execute the sale-deed. He denied that he has failed to pay remaining sale-consideration within the time-limit fixed by the sale-agreement, and therefore, the defendant Nos.1 to 6 got published the public notice, terminating the said sale-agreement. He denied that upon termination of the said sale-

agreement, the defendant Nos.1 to 6 sold the suit-land to the defendant No.7, by registered sale-deed. He denied that at present, the defendant No.7 is in possession of the suit-land. He admitted that except the amount of earnest money, he has not paid any other amount mentioned in the sale-agreement. At this juncture, the witness volunteered to state that if the sale-deed is executed, he would pay. He denied that he has not shown any readiness/willingness to pay the remaining sale-consideration.

9.6 In the further cross-examination conducted on the next adjourned date, the PW-1 Juma Vira Harijan denied that the defendant Nos.1 to 6 had given sufficient opportunities to the plaintiff to perform his part of contract, still however, he has not performed his part of contract. He admitted that he has not produced any documentary evidence to show that he was and is ready and willing to perform his part of contract. He volunteered to state that he was ready and willing to perform his part of contract. He denied that the defendant Nos.1 to 6 have informed him in writing to pay the remaining sale-consideration. He denied that the sale-agreement could not be performed due to default on his part. He stated that his affidavit has been prepared by his advocate. He denied that he does not know what is written in his affidavit. He denied that he has filed this false suit to bring pressure on the defendants. He denied that no any cause of action has arisen for him to file this suit. He denied that the defendant Nos.1 to 6 were compelled to terminate the sale-agreement due to default on his part. He admitted that the sale-agreement is neither registered nor notarized.

9.7 He admitted that the stamp-paper used in the sale-

agreement, was purchased by one Samsudin Badrudin on his behalf. He denied that the defendant No.7 has purchased the suit-land after paying sufficient sale-consideration. He admitted that the defendant No.7 is a *bona fide* purchaser. He denied that at present, the suit-land is of the ownership and in possession of the defendant No.7. He has not seen the recent revenue records of the suit-land. He denied that therefore, he cannot say who is the owner of the suit-land at present. He admitted that he has not challenged the revenue entries made in the revenue record. He denied that he has no any right, title or interest or lien in the suit-land. He denied that before purchasing the suit-land, the defendant No.7 got published the public notice in the newspaper. He denied that he has not raised any written objections against the said public notice. He admitted that he has not produced any documentary evidence to show that there were tenancy rights in the suit-land. He admitted that as all the entries made in the revenue records were legal, he had entered into the sale-agreement. He denied that since he was not having financial arrangement, he could not perform his part of contract. Lastly, he denied that he has filed this false suit.

10. Thereafter, the plaintiff filed the affidavit of Maheshwari Pachan Dayabhai, in lieu of examination-in-chief under Order XVIII Rule 4 of the Code, at Exh.91. In his affidavit, the PW-2 stated *inter alia* that he had signed the said sale-agreement as witness No.2.

10.1 In the cross-examination on behalf of defendants, he stated that he has studied upto Std. I. On 23.12.2010, he had met 4 to 6 people. He admitted that he had not met more that on that

day. On 23.12.2010, he was at Mundra, and had not gone outside Mundra. In Mundra, he was at his home. He stated that Juma Vira Harijan is not his relative, but he knows him. On 23rd, Juma Vira Harijan had come to his house. He admitted that except Juma Vira Harijan, no other person had come to his house on that day. He denied that it has not happened that the said Juma Vira Harijan had made any payment to someone in his presence. He denied that he did not know on what account, the payment was made. He denied that he has not read his affidavit and that he has signed the same without reading it. The said agreement was in respect of the land at Beraja. The seller was Maniben and purchaser was Jumabhai. He denied that no such agreement was executed in his presence, nor any payment of earnest money has been made in his presence, but since the plaintiff is his acquaintance, he has filed false affidavit, and is giving false deposition.

11. Thereafter, the plaintiff filed the closing pursis at Exh.92.

12. Thereafter, the defendants filed the affidavit of defendant No.2 - Harakhchand Jethalal Shah, in lieu of examination-in-chief, under Order XVIII Rule 4 of Code, at Exh.92. He has reiterated what has been stated by the defendants in their Written Statement.

12.1 In the cross-examination on behalf of the plaintiff, he admitted that on 23.12.2010, they entered into the sale-agreement in respect of the land bearing Survey No.233/1 Paiki of Village Beraja, with the plaintiff Juma Vira Harijan. He further admitted that at the time of execution of the said agreement, there

was a right of Gardas Vaghji to release the mortgage, in Village Form No.7/12. In reply to the question that the defendants have not taken any steps till today to remove the said revenue entry, he stated that there was no such clause in the agreement. He denied that as per the agreement, the defendant Nos.1 to 6 were duty-bound to clear the title of the suit-land. He denied that he had not given any notice, calling upon the plaintiff to perform his part of contract. The witness volunteered to state that he issued a public notice in the newspaper. He denied that there was a condition in the agreement that the defendant Nos.1 to 6 had to clear the title of the suit-land.

12.2 When confronted with the original sale-agreement Exh.62, he admitted that in the last paragraph on page-2, there was a condition that, "ઉપરોક્ત ખેતરનો ટાઈટલ કલીયર છે છતાં પણ કોઈપણ વર વાંધો કે રેકર્ડની ભુલભાલ હોય તે ચોખ્ખા કરી આપવાની જવાબદારી બીજા પક્ષવાળાની રહેશે અને તેમાં વિલંબ થાય તો સાટા કરારને મુદત બાધ રહેશે નહીં અને કરાર અમલમાં રહેશે."

12.3 He denied that due to price-escalation of properties at Mundra, the defendant Nos.1 to 6 wanted more consideration of the suit-land from the plaintiff. He denied that therefore, deliberately, the defendants Nos.1 to 6 sold the suit-land, and thereby, committed the breach of contract. Lastly, he denied that he has filed false affidavit, and is giving false deposition.

13. Thereafter, the defendants filed the closing pursis at Exh.100.

14. In his oral submissions, Mr.K.K.Gadhvi, learned advocate for the plaintiff, submitted that in the instant case, the

execution of the sale-agreement has been admitted by the defendants, the receipt of earnest money has also been admitted. He further submitted that due to price-escalation of immovable properties in Mundra Taluka, the defendant Nos.1 to 6 have sold the suit-land to the defendant No.7. He further submitted that the plaintiff has proved his suit, by leading sufficient oral as well as documentary evidence, and therefore, the decree as prayed for, may be passed.

15. On the other hand, Mr.P.D.Jadeja, learned advocate for the defendants, submitted that the sale-agreement has been subsequently fabricated by the plaintiff. He further submitted that the title of the suit-land was clear from the very beginning, but the plaintiff was never ready and willing to perform his part of contract, and therefore, after issuing the public notice and thereby terminating the sale-agreement, the defendant Nos.1 to 6 have sold the suit-land to the defendant No.7. He further submitted that the defendant No.7 has purchased the suit-land after examining the revenue records and after paying full sale-consideration, and thus, the defendant No.7 is a *bona fide* purchaser for valuable consideration without notice. With these submissions, Mr.Jadeja prayed for the dismissal of the plaintiff's suit with costs.

16. Before appreciating the evidence on record, it is apposite to reproduce the rule of evidence as contained in Sec.104 of the Bhartiya Sakshya Adhinyam, 2023, as under:

"104. Burden of proof. - Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist, and when a person is bound to prove the

existence of any fact, it is said that the burden of proof lies on that person."

17. Since the present suit is for specific performance of contract, and since the present suit is governed by the position prior to the Amendment Act of 2018, the relevant provisions contained in the Specific Relief Act, 1963, are reproduced hereunder:

"10. Cases in which specific performance of contract enforceable.

- Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced -

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation -Unless and until the contrary is proved, the Court shall presume -

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:-

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

"34. Discretion of Court as to declaration of status or right. - Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation. - A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and whom, if in existence, he would be a trustee."

"35. Effect of declaration. - *A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of declaration, such parties would be trustees."*

18. Thus, from the above provisions of law, it is clear that the relief of specific performance of contract, is the discretionary relief. In other words, it is left to the discretion of the Court whether to grant or refuse to grant the relief, keeping in view the facts and circumstances of each case. Of course, the Court has to exercise discretion judiciously and on sound principles of law governing discretion, and not as per its whims and caprice. Similarly, the relief of declaration and *perpetual* injunction, is also the discretionary relief. In the instant case, the relief of declaration and *perpetual* injunction, is a consequential relief. Now, in light of the above provisions of law and legal position, let us evaluate and appreciate the facts and circumstances of the case in light of the evidence adduced by the parties.

19. At the outset, if we look at the sale-agreement Exh.62, it is dated 23.12.2010. Therefore, the present suit will be governed by the legal position prevailing prior to the Specific Relief (Amendment) Act, 2018, which has come into force w.e.f. 01.10.2018. Whether the effect of this Amendment Act, 2018 is prospective or retrospective? In this regard, Hon'ble the Supreme Court in the Judgment in the case of *Katta Sujatha Reddy and another Versus Siddamsetty Infra Projects Pvt. Ltd.*, reported at 2022(0) *AIJEL-SC 69740*, made it clear that the effect of the

Amendment Act, 2018 is prospective and not retrospective. Therefore, the present suit seeking specific performance of contract dated 23.12.2010 will be governed by the provisions of the Specific Relief Act, 1963 prevailing prior to the Specific Relief (Amendment) Act, 2018. In other words, as per Section 10, it will be left to the discretion of the Court whether or not to grant relief of specific performance of contract.

Issue Nos.1 to 5:

20. As all the Issues are interconnected, they are dealt with and discussed together, in order to avoid repetition.

21. Now, if we appreciate the evidence on record, it appears that the plaintiff has produced the original sale-agreement at Exh.62. The defendant Nos.1 to 6 do not dispute the execution and existence of the sale-agreement Exh.62. They also do not dispute having received Rs.1,25,000/- from the plaintiff as an earnest money, as mentioned in the sale-agreement Exh.62. Regarding the other contents of the sale-agreement Exh.62, there is no dispute between the parties.

22. The only dispute between the parties to the sale-agreement Exh.62, is that according to the plaintiff, he was and is ready and willing to pay the balance sale-consideration to the defendant Nos.1 to 6, but it was the defendant Nos.1 to 6 who failed to perform their part of contract, by not removing the encumbrance of mortgage. Whereas according to the defendant Nos.1 to 6, there was no stipulation in the sale-agreement Exh.62 regarding removal of encumbrance of mortgage, but because the plaintiff failed to pay the balance sale-consideration within the stipulated time-limit fixed by the sale-agreement Exh.62, the

plaintiff has raised false dispute about removal of encumbrance of mortgage. In this regard, first of all, let us have a look at the terms and conditions stated in the sale-agreement Exh.62. They are reproduced hereunder:

"આ સોદા પેટે સુધીની રકમ રૂ. ૧,૨૫,૦૦૦/- અંકે રૂપીયા એક લાખ પચ્ચીસ હજાર પુરા આજરોજ એકપક્ષવાલાએ બીજાપક્ષવાલાને ચુકવી આપેલ છે, જેની બીજાપક્ષવાલા આથી પહોંચ કબુલે છે બાકી અવેજની રકમ આજથી ત્રણ માસમાં એટલે તા.૨૧/૦૩/૨૦૧૧ સુધીમાં ચુકવી આપવાનું એકપક્ષવાલા કબુલે છે, સદરહુ ખેતરની વેચાણનાં અવેજની રકમની ચુકવણી પુરી થયેથી અને નીચેની શરતો પુર્ણ થયેથી એકપક્ષવાલા જે વ્યક્તિના નામ જોગ દસ્તાવેજ બનાવી આપવાનું કહેશે, તે વ્યક્તિ જોગ દસ્તાવેજ બનાવી આપવાનું આથી બીજાપક્ષવાલા કબુલે છે.

સદરહુ જમીન હાલે સ્વ. જેઠાલાલ ચાંપશીના નામે રહેલ છે રેવન્યુ રેકર્ડ વારસાઈ નોંધ દાખલ કરાવી, પ્રમાણીત કરાવી, રેકર્ડ તે મુજબ અમલ કરાવી આપવાની જવાબદારી બીજાપક્ષવાલા તે વેંચનારાઓની રહેશે, અને જ્યાં સુધી રેકર્ડ ઉપર મુજબ વારસાઈ નોંધની કાર્યવાહી પુર્ણ ન થાય ત્યાં સુધી આ કરારને મુદત બાધ રહેશે નહીં.

ઉપરોક્ત ખેતરનો ટાઈટલ કલીયર છે છતાં પણ કોઈપણ વર વાંધો કે રેકર્ડની ભુલભાલ હોય કે તે ચોખ્ખા કરી આપવાની જવાબદારી બીજાપક્ષવાલાની રહેશે તેમાં વિલંબ થાય તો આ સાટાકરારને મુદત બાધ રહેશે નહીં અને કરાર અમલમાં રહેશે."

23. From the above-mentioned terms of the contract, it is clear that the time was the essence of the contract. The plaintiff was specifically bound to pay the balance sale-consideration to the defendant Nos.1 to 6 within three months i.e. on or before 21.03.2011. Admittedly, the plaintiff has not paid the balance sale-consideration till today. From the above-mentioned terms of the contract, it further appears there was only one condition, which was to be fulfilled by the defendant Nos.1 to 6 and that is -

the defendant Nos.1 to 6 were to take all necessary steps to get the succession entry made and certified in the revenue records of the suit-land on or before 21.03.2011. Now, let us have a look at the evidence adduced, to find out as to whether the defendant Nos.1 to 6 fulfilled their obligation within stipulated time-limit. The sale-agreement Exh.62 is dated 23.12.2010, and the last date fixed for discharging their obligations, is 21.03.2011. The plaintiff has produced a certified copy of the mutation Entry No.2870 at Exh.65, from which it appears that it is a revenue entry relating to succession. By the said revenue entry, the names of the defendant Nos.1 to 6 have been mutated in the revenue record of the suit-land. The said entry No.2870 has been made on 31.12.2010 i.e. after one week of the sale-agreement dated 23.12.2010. The said entry No.2870 has been certified by the Deputy Mamlatdar (Revenue), Mundra, on 11.03.2011 i.e. ten days before the expiry of the sale-agreement Exh.62. Thus, from this evidence on record, it is clear that the defendant Nos.1 to 6 had discharged their obligation well before time fixed for the performance of the contract.

24. So far as the plaintiff's obligation is concerned, it is the case of the plaintiff that he was and is ready and willing to pay the balance sale-consideration, but since the defendant Nos.1 to 6 failed to remove the encumbrance of mortgage of Gardas Vaghji appearing in the column of "other rights" in Village Form No.7/12 Exh.63, he did not pay the balance sale-consideration. In this regard, if we again look at the sale-agreement Exh.62, there is no any such stipulation, which states that it was the obligation of the defendant Nos.1 to 6 to do the needful for the removal of

encumbrance of mortgage. The sale-agreement Exh.62 is completely silent in this regard. The said endorsement relating to mortgage right of Gardas Vaghji, in the column of "other rights" was very much there on the date of execution of the sale-agreement Exh.62. Still however, the sale-agreement Exh.62 is silent in this regard. When there is a specific stipulation in the sale-agreement regarding succession entry, then there should have been a specific stipulation as regards the removal of the encumbrance of mortgage, had the plaintiff in fact intended to get the said encumbrance removed from the defendant Nos.1 to 6 prior to execution of the sale-deed. The plaintiff cannot be allowed to introduce new clause under the guise of "title-clear". In fact, the third paragraph of the sale-agreement, reproduced above, clearly states that both the parties are *ad idem* that the title of the suit-land is clear. Still however, if any objections are raised in future, it would be the duty of the defendant Nos.1 to 6 to clear them. Thus, the said clause is with reference to future objections, if any, whereas the endorsement of mortgage in the column of "other rights" was very much in existence even prior to execution of the sale-agreement. Admittedly, despite issuance of public notices time and again by both the parties and also by the defendant No.7, no any objections have been received from any person including the said Gardas Vaghji. In fact, the intention of the parties was to buy/sell the suit-land notwithstanding the said endorsement relating to mortgage. Consequently, the plaintiff cannot be allowed to escape from his obligation, by making an averment that since the defendant Nos.1 to 6 did not remove the encumbrance of mortgage, he did not pay the balance sale-

consideration. The sale-agreement Exh.62 specifically states that the plaintiff was to pay to the defendant Nos.1 to 6 the balance sale-consideration on or before 21.03.2011. On the last day i.e. on 21.03.2011, the plaintiff sought to extend the limitation, by issuing notice Exh.66 to the defendant Nos.1 to 6 on the ground that the defendant Nos.1 to 6 failed to discharge their obligation. In the notice Exh.66 also, there is no reference of encumbrance of mortgage. For the first time, the plaintiff made a specific mention regarding removal of encumbrance of mortgage in the notice dated 06.04.2011 Exh.69. Therefore, looking to the conduct of the plaintiff, the intention of the plaintiff was to extend the period of limitation of contract Exh.62 under the guise of so-called removal of encumbrance. So far as the readiness of the plaintiff is concerned, the averments made in the plaint and the statements made in the exchange of correspondence between the parties regarding readiness of the plaintiff, are mere words of mouth. The plaintiff has not produced any bank account statement to show that he was having balance sale-consideration ready with him on the date of expiry of sale-agreement or at any date thereafter till the pronouncement of this Judgment. It is settled legal position the plaintiff has to continuously show his readiness and willingness from the date of contract right upto the date of decree, and not upto the date of filing of the suit. In the cross-examination, at the instance of the defendants, the plaintiff has produced a copy of his bank passbooks at Mark 77/1. It is a photocopy of the original. It is not proved by the plaintiff. Still however, if it is read, it does not disclose the credit balance equal to the remaining sale-consideration i.e. Rs.6,73,000/-. In fact, it is

settled legal position that the plaintiff should show credit-balance right from the date of sale-agreement till the passing of the decree. In fact, from the conduct of the plaintiff, it appears that when his turn came to perform his part of contract, he was not having funds to pay the remaining sale-consideration, and therefore, in order to keep alive the sale-agreement Exh.62, the plaintiff introduced a new story of removal of entry of mortgage under the guise of "title-clear". Thus, it is clear from the record that the plaintiff was and is not ready and willing to perform his part of contract, by paying the remaining sale-consideration on time, and that he has failed to discharge his contractual obligation.

25. On the other hand, if we look at the conduct of the defendant Nos.1 to 6, even after the expiry of the contract Exh.62, the defendant Nos.1 to 6 by the reply dated 25.03.2011 (Exh.68) to the plaintiff's notice, granted further time of seven days to the plaintiff to pay the remaining sale-consideration, and thereafter, after expiry of further seven days' time-period, the defendant Nos.1 to 6 terminated the contract Exh.62, by issuing the public notice dated 03.04.2011.

26. Looking to the facts and circumstances of the case on hand, a beneficial reference is required to be made to the Judgment of Hon'ble Supreme Court in the case of *Shenbagam Versus Kk Rathinavel*, reported at 2022(0) *AIJEL-SC* 68252. In para-26 to 29, Hon'ble Supreme Court observed as under:

"26. In evaluating whether the respondent was ready and willing to perform his obligations under the contract, it is not only necessary to view whether he had the financial capacity to pay the balance consideration but also

assess his conduct throughout the transaction.

27. The respondent has alleged that he did not pay the balance consideration as the appellants failed to remove the encumbrance on the suit property. First of all, we note that the agreement to sell the suit property did not specifically record the mortgage over the suit property. However, neither has the appellant denied the existence of the mortgage nor has the respondent claimed that he was unaware of the encumbrance over the suit property at the time of entering into the agreement. The agreement did not expressly detail whose liability it is to discharge the mortgage.

28. Having said that, the terms of the agreement stipulated that the respondent was to pay the balance consideration within a period of six months and "on receipt of the balance consideration", the appellants were to execute the sale deed "pertaining to the property free from all encumbrances". It is evident from the agreement that the liability to deliver the property free from any encumbrance was on the appellants. However, this obligation is prefaced by the condition that the appellants would be required to execute the sale deed free from encumbrance on the receipt of the balance consideration. Thus, the agreement did not specify when the appellants should discharge their mortgage - before the expiry of six months, after receipt of the advance amount, or after receipt of the balance consideration. It only obligated them to ensure that after the balance consideration is received, the sale deed executed should be free from encumbrances. Based on a plain reading of the agreement, we are unable to accept the respondent's plea that he was willing to perform his obligations under the contract. It is evident that he was required to pay the remaining consideration (or indicate his willingness to pay) and only then could have sought specific performance of the contract. The respondent has also urged that the additional amount of Rs.10,000 was paid to the appellants to discharge the mortgage. The acknowledgement signed by the appellants indicates that the money was to meet urgent family expenses. Since no further details have been provided and no evidence has been adduced by the respondent-plaintiff, we cannot conclude that the money was for discharge of the mortgage. Even assuming that the respondent is correct, the agreement still required the

respondent to pay the balance consideration. In this regard, the High Court, while holding in favour of the respondent, has noted that the appellants were free to demand a further amount for discharging the mortgage. This finding ignores the plain terms of the contract. The agreement clearly provided that the balance consideration would be paid and then the sale deed would be executed. How the appellants chose to discharge the mortgage was for them to decide. The respondent had to prove his readiness and willingness to perform the contract.

29. *We shall now advert to the respondent's conduct throughout the sale transaction. The respondent has failed to provide any documents or communication which would indicate that he called upon the appellants to perform their obligations or discharge the mortgage within the time period stipulated in the contract. Even after the expiry of the six months, the respondent did not reach out to the appellants. It is only in response to the appellants' legal notice that the respondent demanded performance of their obligations. Merely averring that he was waiting with the balance consideration and believed that the appellants would clear the encumbrance is insufficient to prove that the respondent-plaintiff was willing to perform his obligations under the contract."*

Thus, the facts and circumstances of the above-mentioned citation are squarely applicable to the facts and circumstances of the case on hand.

27. Further, looking to the prayer-clause of the plaint, the plaintiff has not prayed for any declaratory relief that the act of the defendant Nos.1 to 6 of terminating the sale-agreement Exh.62, is illegal and bad in law. In the recent Judgment in the case of *Sangita Sinha Versus Bhawana Bhardwaj*, reported at 2025(0) AIJEL-SC 75021, Hon'ble the Supreme Court held that, "*Specific performance - in absence of a prayer for declaratory relief that termination/cancellation of agreement is bad in law, a suit for specific performance is not maintainable.*"

28. Thus, in view of my above discussion, I come to the conclusion that the plaintiff has proved that the defendant Nos.1 to 6 agreed to sell the suit-land to the plaintiff for a sale-consideration of Rs.7,98,000/- and executed the sale-agreement. Hence, I answer **Issue No.1 in the affirmative**. However, the plaintiff has failed to prove that the defendant Nos.1 to 6 have not discharged their obligation under the contract Exh.62. Hence, I answer **Issue No.2 in the negative**. The plaintiff has also failed to prove that the defendant Nos.1 to 6 have illegally sold the suit-land to the defendant No.7. Hence, I answer **Issue No.3 in the negative**.

29. So far as the Issue No.4 is concerned, it is true that the defendant No.7 has not stepped into the witness-box to prove his claim that he is a *bona fide* purchaser of the suit-land. However, it has come on record that after due termination of the contract Exh.62, the defendant Nos.1 to 6 sold the suit-land to the plaintiff, by registered sale-deed. It is also a matter of record that before execution of the sale-deed, the defendant No.7 had issued a public notice, inviting objections from the public at large, however no any objections were raised from the public, including the present plaintiff. Therefore, it can be safely said that the defendant No.7 is a *bona fide* purchaser of the suit-land. Hence, I answer **Issue No.4 in the affirmative**.

30. Considering the conduct of the defendant Nos.1 to 6 reflecting from the oral as well as documentary evidence, and in view of my above discussion, I am of the view that the defendant Nos.1 to 6 have proved that despite the grant of further seven days, the plaintiff did not pay the remaining sale-consideration to

them, and therefore, the sale-deed could not be executed. Hence, I answer **Issue No.5 in the affirmative.**

31. Thus, on overall appreciation of the evidence adduced by the parties, this is not a fit case to exercise the discretion vested in this Court by the provisions of Sections 10, 31 & 34 of the Specific Relief Act, 1963, in favour of the plaintiff. Resultantly, the plaintiff's suit deserves to be dismissed. In conclusion, I pass the following final order:

:: FINAL ORDER ::

1. The present **Special Civil Suit No.40 of 2017 (Old Special Civil Suit No.15 of 2012)** is hereby **dismissed**.
2. The parties to bear their respective costs.
3. Decree be drawn accordingly.

Pronounced in open Court on this **7th day of May, 2026.**

Place: Mundra.

Date : **07.05.2026.**

[Hitesh Jayantilal Tanna]
Principal Senior Civil Judge & A.C.J.M.,
Mundra, Dist. Kachchh.
Judge Code - GJ00955.

**Self.*