: Order Below Exh. : 5

(Under O.39 R. (1) and (2) of C.P.Code

(1) The broad facts which have been pleaded in the plaint as well as in interim injunction application i.e. Exh. 5 or can be otherwise culled out from the documents filed by the plaintiffs are that the suit property situated at Jetalpur, Vadodara, Revenue Survey No. 124, 124/1, 124/2, 124/3, 125, 126, and 127 are non-agricultural lands and in it, there is Suvarnapuri Society, plot No.6, Sity Survey No. 1056, having ad-measuring 654 Sq.Mt. More particularly described in para 1 of the application vide Exh.5 is open plot and defendants wants to sell it with the condition as it is, approach to plaintiff No.1 and price was fixed Rs. 2,00,00,001/- and as consideration amount Rs. 2,51,000/- plaintiff has executed Token Pavti to defendant No.2. It was condition that after the getting title clearance certificate, defendant has to execute registered sale deed in favour of plaintiffs and consideration amount shall be paid within 3 months with 3 equal installment and it was also agreed that price to be paid by plaintiff according to measurement found at the place. It was also agreed that in suit property there are some servants quarters therefore 2 room shall be also built for them and possession shall be hand over after getting title clearance certificate. To get title clearance certificate the responsibility was on defendant but as having good relation with plaintiff No.1, defendant has asked him to do it. Plaintiff No. 1 has started procedure for getting title clearance certificate and several objection was raised by different persons and plaintiff has asked to remove the objection taken by persons, but defendant has replied that he can't do any thing except giving cooperation to plaintiff No.1. There after plaintiff No. 1 has approach to No. 2 and he get ready and agreed to purchase conjointly with plaintiff No.1. and for that purpose defendant has accepted Rs. 1,11,000/- from plaintiff No. 1 and executed an agreement to sell on dated 27/11/2019. It is further stated that on being measurement, the total area was not found according to agreement. Plaintiffs have did procedure for

measurement from the DILR and spent approximate Rs. 25000/- moreover the security persons have also employed from plaintiffs, to remove huts, possession were also transferred to plaintiffs, the persons who were maternal uncle of defendant were having illegal possession were also removed by present plaintiffs, by using JCB machine the plot were cleaned and made smooth surface of plot which was bumpy and rough, made compound wall with gate and for doing these all work and activities, plaintiffs have spent time and money and removed many obstructions connected with the suit property. As possession made open, the price hiked and for such reason, defendant got malafide intention and to sell it another person with hiked price, denied to execute sale deed in favour of present plaintiffs. Before filing of this suit plaintiffs have issued notice for the performance of agreement but defendant denied to do, therefore suit has been instituted for the performance of the agreement and pending it prays to restrain defendant to transfer it to any other person with allied prayers.

(2) The defendant have filed their written statement vide Exh. 14 of plaint and vide Exh. 15 of injunction application, and in both, after denying in toto, stated mainly that looking to the averments made in plaint and read with the agreement to sell vide Mark 4/3, it has been not signed by both the plaintiffs, and agreement does containing that plaintiffs are joint purchasers therefore performance can’t be done as per the provisions of the Specific Relief Act. As there is condition that price shall be paid in 3 months from the 27/11/2019 and plaintiffs have fail to pay entire consideration amount therefore performance can’t be made as the condition regarding the time was essence of contract. The agreement is unregistered documents, therefore it could be not taken in to consideration also. Looking to the conditions mentions in agreement and notice issued by an advocate of plaintiffs, they are not entitled for any equitable relief. Thus it is clear that there is no consensus ad idem between the all the parties for the agreement

for sale of immovable property. It is also stated that plaintiff is not entitled for ant alternative prayer which asking for performance of contract and also in alternative plaintiffs are not entitled for any equatable reliefs, hence submitted that plaintiff is not having any prima facie case in their favour and suit also not tenable therefore application for injunction may be rejected.

(3) Read the application vide Exh.5 and perused all the materials on records. Read the written statements submitted vide Exh. 14 and 15 by defendant. In support of his arguments, learned advicates of the parties relies upon following citations.

<u>From Plaintiff Side</u> :-

-2018 (0) AIJEL-HC 239925Patel Harji Shamji v. Dhamshi Meghji

-2018 (0) AIJEL-SC 62411 Ameer Minhaj v. Dierdre Elizabeth

-2021 (0) AIJEL-HC 242661 Taufik Idrishbhai Patel v. Nurabhai Alibhai Momin

<u>From Defendant Side</u> :-

-2009 (4) GLR 3095 Haji Yusufbhai Siddiqbhai v. New Stars Developers Organizer

-2009 (0) AIJEL-HC 221341 Jasoda Indralal Vadhva v. Hemendrabhai Kaulal Vyas

Read the above all citation, kept in mind ratio laid down in it, and whenever deem fit, hereinafter will discuss relating to facts of this Case.

For deciding injunction application, following points are arises for the determination.

1) Whether the plaintiff proves strong prima-facie case in his favour ?

2) Whether the balance of convince is in the favour of the plaintiff ?

3) Whether plaintiff has got irreparable injury?

4) What order ?

Findings :-

My finding for above all issues in the affirmative with following reasons

Reasons :-

It is pertaining to note here that the power to grant a temporary injunction is in the discretion of the court, this discretion however, should be exercised reasonably, judiciously and on the legal principles. Injunction should not lightly granted as it adversely affects the other side. Generally, before granting the injunction, Court must satisfied about the following aspects namely, prima-facie case, irreparable injury and balance of convenience.

(4) The first rule is that the applicant must make out a *prima facie case* in support of the right claimed by him, court must be satisfied that there is a bona fide dispute raised by the applicant, there is strong case for trial which needs investigation. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima-facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.

Existence of the prima facie case alone does not entitled the applicant for a temporary injunction, but the applicant must satisfied the court that he will suffer *irreparable injury* if the injunction as prayed for is not granted and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury.

Third condition for granting interim injunction is that the *balance of convenience* must be in favor of the applicant. In other words, court must be satisfied that the comparatives mischief hardship or inconveniences which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it.

The object of the interlocutory injunction is to protest the plaintiffs against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favor at the trial. The court must weigh one need against another and determine where the balance of convenience lies.

(5) On going through the record and proceedings of this case and after giving thoughtful consideration to the materials on the records it transpires that, it is not disputed that the defendant is owner of suit land. Looking to the nature of documents produced by present plaintiffs, it prima facie seems that they corresponding with some understanding made between the plaintiffs and defendant regarding purchase of suit property.

1-In Token Pavti, it seems that there are signatures drawn by seller and buyer i.e. defendant and plaintiff No.1

2-In agreement for sale vide Mark 4/4, it seems that signatures drawn by defendant and plaintiff No.2

3-Notice transactions made between both the parties through their respective advocates for performance and it's denial.

4-Title clearance certificate is issued in the name of plaintiff No.1 Mr. Veer Patel for the disputed property which produced from the possession of the plaintiff side and have not denied this fact by defendant side.

5-Consideration amount was made ready for registered sale deed with balancing amount in Bank account by plaintiff side.

Looking to above all documents, prima facie seems that though there was condition that sale deed shall be made within 3 months from the date of agreement but before that according to say of plaintiffs, they have did certain acts like get vacant the possession from third parties who were having illegal possession, measurement did by DILR, get title clearance certificate, made compound wall in disputed property etc.. but then after defendant denied to execute registered sale deed. To show the readiness and willingness plaintiff has produced the copy of statement of Bank account of and in fact these documents are not denied by defendant side. **If we see all the documents collectively**, it appears prima facie that parties have constituted an agreement for specific purpose, however its evidentory value will decide only after taking evidence from both the side. The basic principle like proposal and acceptance and seems mutual assent and their behavior enough to objectively construe agreement. The basic requirement for enforcement of agreement are an offer, an acceptance, all are competent to enter into agreement, having lawful subject matter and have paid consideration also irrespective with the actual amount, so it also seems plaintiff is having prima facie case.

(6) Now, on discussing to the points advanced in arguments from the defendant side that there is no name in Token Pavti or there is no name in agreement with both the plaintiffs therefore performance of so-called agreement is not possible. In this regard, if we see the reply of notice issued by plaintiffs, defendant has challenged the validity of agreement by way of raising an issue regarding limitation of 3 months and failing to pay consideration amount in 3 months, to rely upon or not for these both issues, needs to record evidence. So far as the concerned with the unregistered agreement, Honourable High Court has decided in the Case **Taufik**

Idrishbhai Patel v. Nurabhai Alibhai Momin reported in 2021 (0) AIJEL-HC 242661 Coram : Honourable Mr. Justice A C Joshi, it has been held that registration of document is not sine qua non for receiving the same as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1977 or as evidence of part performance of a contract for the purpose of S. 53A of the Transfer of Property Act or as evidence of any collateral transaction not required to be effected by registered instrument. The relevant para 7 is hereby produced.

> 7. Having heard the arguments advanced by the learned advocates for the respective parties so also perusing the impugned order below exh. 5 dated 26.02.2020, it appears that the learned trial Judge has arrived at a conclusion in paragraph 8 of the impugned order to the effect that since the so-called agreement to sell is unregistered one and when the same is not even notarized, prima facie, the same cannot be considered as a legal and valid document vis-a-vis the fact that, there is alternative prayer made by the plaintiff - appellant herein to refund the amount of Rs.65 lakh with interest, no irreparable loss would cause to the plaintiff - appellant and hence, the application exh. 5 is not required to be entertained.
>
> 7.1 In the case on hand, it is an undisputed fact that the so- called agreement to sell is a non-registered document and as referred to herein above, the learned trial Judge has rejected the application exh. 5 on that count. In this regard, section 49 of the Registration Act, 1908 is relevant, which speaks thus:
>
> "49. Effect of non-registration of documents required to be registered.--No document required by section 17 1[or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall--
>
> (a) affect any immovable property comprised therein, or
>
> (b) confer any power to adopt, or
>
> (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:
>
> [Provided that an unregistered document affecting immovable property and required by this Act or theTransfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.] " emphasis supplied
>
> 7.2 A bare perusal of section 49 of the Registration Act reveals that discretion is vested in the Court to receive an unregistered document as evidence of a contract in a suit for specific performance under Chapter II

of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument.

7.3 In this regard, it would be apt to refer the to decision of this Court in Kaushik Rajendra Thakore (supra), as relied by the learned advocate for the appellant, more particularly, Head Note 'B' of the same, which reads as under:

"(B) Registration Act, 1908 - S. 17 as amended by Gujarat Act 7 of 1982 - S. 49 - As laid down in proviso to S. 49 of the Act, the suit of the plaintiff would not fail on the ground of compulsory registration introduced by amendment to S. 17 by Gujarat Act, 7 of 1982.

A new contention is advanced by the learned advocate for the appellant that Section 17 of the Registration Act, 1908, is amended by Gujarat Act 7 of 1982, which makes the instruments which purport or operate to effect any contract for transfer of immovable property compulsorily registrable by adding Clause (aa) therein. The learned advocate for the appellant submitted that in view of the amendment introduced by Gujarat Act 7 of 1982, the amendment is given retrospective effect by Section (1A) of the Gujarat Act 7 of 1982, the result of which is that the agreement to sell in question (Exhibit 29) must be de-exhibited, with the further result that it would be devoid of any legal effect and the plaintiff would be de-barred from basing any cause of action on such an agreement to sell. However, the answer to this contention is found inSection 49of the Registration Act, 1908, which we reproduce below to appreciate its full effect:

"49. No document required bysection 17(or by any provision of theTransfer of Property Act, 1882 (4 of 1882) to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1982, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1977 (3 of 1977) or as evidence of part performance of a contract for the purposes ofSection 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.) "

The proviso to Section 49 of the Registration Act makes it abundantly clear that the suit of the plaintiff would not fail on the ground of compulsory registration introduced by amendment to Section 17 by Gujarat Act 7 of 1982. This contention was not originally raised in the trial proceedings, but we permitted the learned advocate for the appellant to argue on this contention, as it is purely a question of law. We reject the same contention, however, by relying on the proviso to Section 49 of the Registration Act, 1908."

7.4 In the aforesaid case, this Court, by relying upon proviso to section 49 of the Registration Act, rejected the contention of the learned advocate for the appellant therein that by virtue of Gujarat Act 7 of 1982, the instruments which purport or operate to effect any contract for transfer of immovable property compulsorily registrable by adding Clause (aa) therein.

7.5 Yet in another decision in Rajiv Maheshkumar Mehta (supra), as relied by the learned advocate for the appellant, this Court has, in the similar set of facts and circumstances to that of the present one, relying on the aforesaid decision of this Court in **Kaushik Rajendra Thakore v. Allied Land Corpn. andOthers, 1987 (1) GLH (U.J.) 22** vis-a-vis other decisions, has observed in paragraph 10 of the same as under:

"10. In the above view of the matter, this Court is of the opinion that the trial Court erred in dismissing the temporary injunction application filed by the plaintiff. The trial Court appears to have arbitrarily exercised its discretionary powers in refusing to grant temporary injunction as prayed by the plaintiff in his application and it can safely be said that the discriminatory order passed by the trial Court is perverse in nature, which warrant interference by this Court." emphasis supplied

7.6 In another decision relied by the learned advocate for the appellant, again relying on the aforesaid decision of this Court in Kaushik Rajendra Thakore (supra), this Court has held that the learned trial Court has committed an error in refusing the injunction as prayed for.

7.7 Thus, pursuant to the facts and circumstances of the case on hand vis-a-vis on perusal of the aforesaid settled legal position it is abundantly clear that registration of document is not sine qua non for receiving the same as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1977 (3 of 1977) or as evidence of part performance of a contract for the purposes ofSection 53Aof the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument. So far as the Title Clearance Certificate as well as the affidavit of Laxmanbhai Nathabhai Mer suggesting the agreement to sell to be a fraudulent one are concerned, the same is a question of trial and at this stage, this Court needs not to go into it. The factremains that the application exh. 5 is rejected on the ground of non-registration of the said agreement to sell, which, in view of the discussion made in the preceding paragraphs of this judgment, appears to arbitrary, perverse, unjust and against the settled principles of law.

7.8 The trial Court concerned has also observed that in view of alternative prayer in suit, temporary injunction (application exh. 5) is not required to be granted. In this regard, if section 29 of the Specific Performance Act, 1963 is seen, it goes to say that, a plaintiff instituting a

> suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly. Thus, by virtue of this provision, a plaintiff can very well make alternative prayer in a suit for specific performance, however, for such a prayer, temporary injunction is not barred under the law in a fit case. Further, under the provisions ofsection 21of the Specific Relief Act, in a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance. Accordingly, considering the facts and circumstances of the case on hand vis-a-vis the settled legal position, in the opinion of this Court, present appeal merits favourable consideration.

Same ratio has been laid down by honourable high court in the Case of **Bharatkumar Ishwarlal vs Girishbhai Manubhai & decided on 26 August, 2013 Coram : Honourable Mr. Justice S H Vora,** and also in the Case of **S Kaladevi vs. V R Somsundaram reported in (2010) 5 SCC 401 (Honourable Supreme Court)**

So, merely an agreement which is unregistered and notarized document, doesn't mean that plaintiffs are not having prima facie Case, in fact by making agreement and Token Pavti denotes that there is privity of contract also. Another contention taken by learned advocate of the defendant that the notice were not served from the present plaintiffs to show the readiness and willingness, this contention also does not survive as plaintiffs has produced statement of account vide Mark 4/11 for arrangement of money. In the Case of **Patel Harji Shamji v. Dhamshi Meghji reported in 2018 (0) AIJEL-HC 239925 (Coram : Honourable Mr. Justice J B Pardiwala)** Honourable the High Court has held in para 30 that

> " Ready and willingness are to be gathered from the evidence of the parties and the capacity to pay. The plaintiff claiming the relief of specific performance, is not required to exhibit the currency notes to show his ready and willingness. He should be capable and should have the capacity to pay on demand the sale consideration whether from his account or after arranging the same from reliable sources. The law does not impose an obligation on a party requiring it to exhibit its mean by physical demonstration. Suffice it to say for a party that it possess and/or is capable of gathering sufficient means to perform of the contract by

> paying the balance sale consideration. Readiness and willingness have various ingredients and one of them is that party to an agreement should be able to fulfill its obligation in regard to payment of the sale consideration…………."

(7) Considering to the facts of this particular Case, and according to my thoughtful consideration, there is agreement to sell between defendant and plaintiff No. 2, while plaintiff No. 1 and defendant has signed Token Pavti who has acted for suit property as agreed with defendant is prima facie denotes that parties had entered into contract. There is facts that earnest money had been accepted by defendant side, according to plaint property related original document and papers have also handed over to plaintiff by defendant rest of the amount to pay to defendant was also made ready from plaintiff side shows clear picture that parties were entered into the contract. So defence taken that it was not concluded contract cannot accepted. Under such circumstances, and looking to the facts and conduct of the defendant if injunction would not grant, and if he would not restrain from transferring the suit property, than he may be transfer it, and consequently there would be more and multiple litigation. In the having similar facts of the Case of before the Supreme Court, reported in **2009 (0) GLHEL-SC 43004 N. Srinivasa v. Kuttukaran Machine Tools,** honoubable the Supreme Court has held that there was an agreement to sell and parties have paid and balance amount to be paid at the time of registration but respondent was not willing to perform his part of contract to execute sale deed, on the contrary trying to sell the disputed property to another party at much higher price then appellant has made his Case prima facie and entitled to get injunction thereof.

(8) According to findings on above mentioned issues, it seems that for the contract :- offer, acceptance, consideration and an agreement in writing have made between the parties and these circumstances, plaintiffs have made prima-facie case, balances of convinces is also in the favor of the plaintiff,

looking to the facts of the Case, when several acts has been done by plaintiff No. 1 including getting title clearance certificate and made open plot in salable condition by getting possession from third parties who were having illegal possession of said plot and for all means there is no likely hood of any irreparable loses to the defendant side, therefore application filed for injunction by the plaintiff deserves to be allow, and according following order.

:ORDER:

(1) An application filed Vide Exh. 5 by plaintiff under O.39, R.1 and 2 is allowed and prayer asked in Para 10(1) of the application is granted, further defendant is temporarily restrain to execute any document including sale deed of suit land to any other person, and further restrain from the present situation of possession of suit land till the further order of this Court or final disposal of this suit.

(2) No order as to costs

(3) It is hereby made clear that by pronouncing this orders, this Court have not express any opinion on merits of the Case.

Signed and Pronounced in virtual mode i.e. by uploading this judgment on CIS module due to present situation of Covid-19 pandemic, and order passed by Honourable High Court dated 07/01/2022 and District Court, Vadodara order vide 67/2022 Dated 08/01/2022,

on today 17th day of January, 2022

17/01/2022

SANJAY BABULAL SHAH
GJ00755
4th Addl. Sr.Civil Judge,
Vadodara