

GJVD020017422003



Received on - 28/04/2003
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Decided on - 29/02/2024
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20 - 10 - 01

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**IN THE COURT OF 3rd ADDITIONAL SENIOR CIVIL JUDGE
AT VADODARA**

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Special Civil Suit No. 278/2003

Exh:116

Plaintiff:

(1) "Shanti Contruction" a Partnership Firm
though its Partner.

1/1 Ishwerbhai Valjibhai Prajapati
Res - 29, Jivan Prakash Society,
Opp- Satyanger Society, Harni Road,
Vadodara.

1/2 Bakulbhai Hasmushbhai Vakil
Res- Maruti Dupex, Nizampura,
Vadodara.

1/3 Legal heirs of deceased Anilbhai Gordhanbhai Prajapati
1) Gitaben Anilbhai Prajapati
2) Nilesh Anilbhai Prajapati
3) Rahul Anilbhai Prajapati
All Res-E/193, Aakash Ganga Society
New Sama Road, Vadodara.
(Added as per Order Below Ex.64)

1/4 Dipakbhai Bansilal Shah

Res- Maninager Society,
Manjalpur, Vadodara

Versus

Defendants:

(1) Legal heirs of deceased Gangaben Ramdas Patel.

1/1 Vikrambhai Rambhai Patel
1/2 Atulbhai Rambhai Patel
1/3 Bupendrabhai Rambhai Patel
1/4 Vastupal Rambhai Patel
All Res- 55, ShreeNiketen Society,
Sumul Deri Road, Surat.

(2) Jitendra Ambalal Patel

Res- Jayesh Colony, Fateh ganj,
Vadodara.

(3) Ajitbhai Madhubhai Patel

Res- Aamrapali Society, Karilibag,
Vadodara.

(4) "Dulari Contruction" Partnership Firm

though its Partner Mr. Hiteshkumar Pravinchandra Shah
Res- Kamteker no vado, Near- Madyavarti School,
Dandiya Bazar, Vadodara.

(5) Ashwinkumar Kanaiyalal Patel (Bapu)

Res- Krushma Compound, Javahernager Society,
R.V.Desai Road, Vadodara.

Subject :-Suit filed at value of Rs.63,92,940/- for Specific performance of
contract and declaration as well as permanent injunction.

Appearance:

The Ld. Advocate for the plaintiffs side :- Mr.V.N.Tilokani
The Ld. Advocate for the defendant No.4 :- Mr. P.R.Thakker.

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Cases Relied on :-

- (1) Devshi Gangaji Rabadia Vs. Jayantibhai Jerambhai Rabariya
R/SECOND APPEAL NO. 143 of 2016 (Hon'ble Gujarat High Court)
- (2) Patel Ramanbhai Mathurbhai Vs. Govindbhai Chhotabhai Patel
R/SECOND APPEAL NO. 211 of 2018 (Hon'ble Gujarat High Court)
- (3) Rakesh Mohindra Vs. Anita Ber
2015 (0) AIJEL-SC 57295 (Hon'ble Supreme Court of India)
- (4) M. Chandra Vs. M. Thangamuthu,
(2010) 9 SCC 712, (Hon'ble Supreme Court of India)
- (5) Kalidas Vs. Babaldas, reported
(1993) 2 GLR 1645 (Hon'ble Gujarat High Court)
- (6) Akbarbhai Kesarbhai Sipai Vs. Mohanbhai Ambabhai Patel,
C/SA/183/2014 (Hon'ble Gujarat High Court)
- (7) H. Siddiqui Vs. A. Ramalingam,
(2011) 4 SCC 240 (Hon'ble Supreme Court of India)

:- JUDGMENT :-**Dated- 29/02/2024**

- (1) The plaintiff has been filed the present suit to geting decree of specific performance of contract as well as declaration and permanent injunction for suit properties situated at Vadodara City, Babaji pura, City Servey Vadodara section-B, Tika No.3/3, City Servay No.101/2 to 101/10, 101/22 to 101/27, 101/73 and 101/74, ad-measuring 1951.14 sq.mt. and City Servay No.101, Khoot No.5,6,7 of Vadodara City (***herein after referred as 'the suit properties' for the sake of convenience***)
- (2) **Brief facts of the present suit are as under :**
 - 2.1) That the plaintiff is a partnership firm and doing business of land development and construction activities in Vadodara. That the defendant no.1 is the owner and possessor of the property situated at registration district sub-district Vadodara, city survey Babajipura vibhag, Manek rao road, vibhag-B, tika No.3/3, city survey no. 101/2 to 101/10, 101/22 to 101/27, 101/73 & 101/74 having total area of 1951.14 sq.meter and city survey no. 101's khoot no. 5,6,7 (***herein after referred***

as ‘the suit properties’ for the sake of convenience) and defendant No.1 Gangaben Ramdas Patel is the owner and possessor of khoot no. 5,6,7. It is the say of the plaintiffs that after the death of said Gangaben Ramdar Patel, defendant no. 1/1 to 1/4 became the joint owner of the said property.

2.2) That in the year 1998, owners are wanted to sell the suit properties, so plaintiff has contacted defendant no.1 Gangaben Ramdas Patel and her sons Vikrambhai and Vastupalbhai and decided the consideration amount of Rs. 15,00,000/- (Fifteen lakh) and that Gangaben Ramdas Patel had executed the banakhat agreement on dtd. **03/09/1998** and also the construction development and development agreement for sell have been executed in favour of the plaintiff for this immovable property and at the time of said agreements, plaintiff had paid Rs. 1,00,000.00 (one lakh) by way of bank draft and it is clearly written in the agreement that the said amount has been accepted by Gangaben Ramdas Patel against the consideration amount and the balance amount be paid as per the terms and conditions of the agreement. That at that time, power of attorney was also given in favour of the plaintiff (which can not be canceled). That as per the above said agreement, in the said property, there were tenants in some parts of the property and action has to take for taking possession from those tenants and it was clearly agreed that, defendant no.1 has to give all assistance and kind co-operation. Further, apart from this, action had to be taken to obtain the title clearance certificate of the said property and the remaining sale price has to be paid subject to the conditions of obtaining all necessary permissions for the sale documents.

- 2.3)** That after the aforesaid agreements were made in favour of the plaintiff, the plaintiff tried to get co-operation from the tenants of the said property to development the said property and claims were also filed against the tenants when it was deemed necessary. That plaintiff has also paid large amounts to the tenants to obtain the possession from some of the tenants including other huge expenses have been incurred by the plaintiff.
- 2.4)** It is further the say of the plaintiffs that during this time, some of the partners among the plaintiffs were separated and Gangaben Ramdas Patel had renewed the contract of tenancy and construction, development agreement regarding the immovable property on dtd. **28/03/1999** in favour of the plaintiffs. That even in these agreements, all the facts, sale consideration, terms and conditions were also decided and plaintiffs have initiated proceedings for obtaining permission for the construction and for that, the amount to be paid to the Vadodara City Development Authority for development proceedings, which has been paid by the plaintiffs. Not only that, as per the rules of Vadodara Mahanagar Palika, proceeding initiated for taking NOC from the Fire brigade and further matter was also initiated for taking permission from the Airport authority.
- 2.5)** It is the say of the plaintiff that during this time, a settlement was reached to vacate the rented premises from one of the tenant of the said property Vivek Ramchandra Kate and for that a big expenses were incurred by the plaintiffs and receipts were also issued in favour of the plaintiffs. Further arrangements were also made for other tenants to stay temporary in other property and for that proceeding for

payment of advance rent were also done by the plaintiffs. Not only that, other than the amount mentioned in the banakhat, amount paid by the plaintiffs to the owner Gangaben Ramdas Patel. That a lot of time spent in legal disputes with the tenants.

- 2.6)** That as the defendant no.3 expressed his desire to keep the said property, it was decided to assign all the rights to Ajitbhai Madhubhai Patel (defendant no.3), which has arisen in the said property in favour of the plaintiff. That, since it was decided to assign the rights of the plaintiff in favour of the defendant no.3, negotiations were started with the defendant no.3 regarding the amount to be taken. That the defendant no.3 has stated that he wants to assign the rights of the plaintiff in this property and enter into agreements for the said property in favour of the defendant no.4 Dulari construction and therefore, defendant no.3 said that the amount which will be received from the defendant no.4 will be paid to the plaintiff. However, in that regard, an agreement was drafted and sent to the plaintiff from the defendant no.3 for assigning the rights of the construction and development agreement of the plaintiff. In it, an agreement was drafted subject to several conditions naming the defendant no.3 and Gangaben Ramdas patel as the second party and the name of the plaintiff as the third party. At that time plaintiff has informed to mention the names of Ajitbhai Patel (defendant no.3) as first party and the defendant no.4 and other person who wants to take the property. But the defendant no.3 stated that no final agreement has been concluded with the defendant no.4 or anyone else and therefore, as the question of writing any such name did not arise. At that time, the defendant no.3 requested the plaintiff to execute the said

agreement forthwith and therefore on **24/01/2000** plaintiffs proceeded to enter into an agreement immediately but Gangaben Ramdas Patel or her Power of attorney could not come from outside and were not present on that day. That the name of Gangaben Ramdas Patel as the second party, was cancelled by hand from the draft agreement and that the plaintiff and defendant no.3 have signed the agreement before the Notary Sh.J.G. Bhatt with two other persons as witnesses.

- 2.7)** That this agreement **dtd.24/01/2000** which was executed in execution of the agreements of the plaintiff with the original owners, as mentioned therein, whatever amount paid by the plaintiffs as selling price or other expenses, on account Rs. 50,00,000.00 (Fifty lakh) decided to pay to the plaintiffs and against that, Rs.3,00,000.00 (Three lakh) paid to the plaintiff. For that defendant no.3 has given cheque of Rs. 2,00,000.00 (Two lakh) to the plaintiff and defendant no.4 has given cheque of Rs.1,00,000.00 (one lakh) to the partner of the plaintiff Sh. Ishwarbhai Prajapati. Not only that, it was also clearly mentioned in the agreement that remaining amount is to be fully paid to the plaintiff. Further to that, it has been clearly decided in the agreement dtd. **28/03/1999** that till the full payment made to the plaintiff, all the rights be continued in favour of the plaintiff and after the full payment be paid to the plaintiff, then only the sale documents or other agreement will be entered into. And for this reason, the original earlier agreements were kept with the plaintiff only. And that original agreements are with the plaintiffs till today. That the defendant no.3 has issued the cheque in favour of the plaintiff without mentioning the dates and plaintiff has to present the cheque when said by the defendant no.3, when

the amount received from the defendant no.4 or other persons in the account of the defendant no.3 and so the question not raised to present the cheque in the bank. That agreement was made that till the full and final payment made to the plaintiff, his right be continued over the property and other writings as per their requirement, and sign on blank papers be taken from the plaintiff and if any writing other than this, be received, be treat as null and void. After that, repeated requests were made to the defendant no.3 for payment, but defendant no.3 was wasting time without any interest or valid reason and also avoiding payment to the plaintiff. During this time, plaintiff came to know that proceedings/ agreements were taken place by the defendant no.3 in favour of the defendant no.4 and so, plaintiff has asked for explanation and also requested to make the payment in favour of the plaintiff and that the defendant no.4 has accepted the liability to pay such amount to the plaintiff and on dtd. **09/10/2000**. the MOU was written on blank paper and that agreement was entered into between plaintiff and partnership firm named Dulari Construction and out of the amount payable to the plaintiff, Rs. 12,50,000/- was payable in November 2000 and after that the remaining amount was to be paid in nine months in 3 equal installments. And thus, the defendant no.4 was agreed to pay Rs. 47,00,000/- to the plaintiff. That on such writing, partners of the plaintiff and Hiteshkumar Pravinchandra and others have signed on behalf of the Dulari construction. At that time, defendant no.3 has informed that the cheque issued by them are with the plaintiff and hence, it is to be treated as security amount and thus, defendant no. 3 & 4 have given confidence to the plaintiff that they will get their full amount.

- 2.8)** As stated above, on dtd. 24/01/2000, when the plaintiff entered into an agreement assigning their rights in favour of the defendant no.3, at that time, some other agreements and writings were also executed from the defendant no.3 and thus, the power of attorney executed in favour of the plaintiff was canceled and signatures were taken on some agreements mentioning the names of plaintiff and their partners and same was executed in favour of Gangaben Ramdas Patel. That it was also written that for the said property, if any agreement be executed in favour of the defendant no.3 Ajitbhai Madhubhai Patel or in favour of any other person, in that case, plaintiffs have no objection. That from the starting, persons of the Dulari Construction i.e. defendant no.4 have all this information. Not only that, Rs. 1,00,000/- is also paid to the plaintiffs only and agreement was also made for the payment of remaining amount. Thus defendants have all information about the amount payable to the plaintiff and defendant no.4 has accepted all the liability for that.
- 2.9)** That during this time, as stated above, after the settlement between the plaintiff and the defendant no. 3 & 4, the amount which the plaintiffs were to receive, due to the earthquake in the state of Gujarat in January, 2001, there was a huge slowdown in the construction and sale of apartments and not only that, but then the demand for apartments was not in the market, their construction was almost stopped and therefore, there was a big slowdown in the business of building construction, due to which the defendant no.4 Dulari construction asked the plaintiff to wait for the amount for some more time and gave an assurance that the amount along with interest would be paid to the plaintiff and so plaintiff had not immediately demanded the amount due to them. During this time, there was communal riots in the state of Gujarat in the year 2002 and there was big slowdown in the market and as the plaintiffs themselves are in the same business and therefore, they understood and considered the request of the defendant no. 3 & 4 for extension of

time and so, there was no question of execution of agreement.

2.10) That since last some times, when the plaintiff requested the defendant no. 3 & 4 for execution of agreement in their favour, they refused to pay the amount under one or other pretext and it seems that the intention of the defendant no. 3 & 4 was to deprive the rights of the plaintiff. Not only that but they come to know that defendant no. 3 & 4 have entered into any agreements regarding the said property in favour of defendant no.5 and thereby they created any right in favour of the defendant no.5 and therefore, on inquiring on dtd. **10/04/2003** in the office of sub-registration, Vadodara, they came to know that there was an agreement regarding the claimed property on dtd. **16/12/2002** in favour of the defendant no.5 and the said agreement of sale has been registered on dtd. **17/10/2002** in favour of the defendant no.4. In fact, many agreements have been entered into in favour of the defendant no.4 before, then also on dtd. **17/10/2002** after registering the agreement of sale, after some time, he entered into an agreement in favour of the defendant no. 5. These all agreements were done by the power of attorney holder Jitendra Ambalal Patel who is defendant no.2 and hence, defendant no.2 is also joined as party to the suit.

2.11) That it has come to the plaintiff's knowledge that any transaction has been made in respect of the said property in favour of the defendant no.5 and thus defendant no. 5 will do any development work or any other work in the said property. That, all the rights which the defendant no. 3 or 4 get in the claimed property, can be got only after taking into consideration the rights of the plaintiff and apart from that they do not get any rights. That defendant no.4 already has knowledge of the right of the plaintiff and they have already accepted the liability towards the plaintiff. That the defendant no. 3 to 4 have entered into any dealings with the defendant no.5 in this matter and on that basis, any agreements entered into in favour of the defendant no.5 are illegal and null and void

against the right of the plaintiff. Not only that, if the amount has not been paid to the plaintiff as decided, in that case, the agreements executed on dtd.**28/03/1999** in favour of the plaintiff automatically come into existence and therefore, according to all those agreements, the plaintiffs have already acquired the rights in the said property, before the defendants and therefore, the defendants have no right or authority to act against the rights of the plaintiff. That it is the responsibility and duty of the defendants to pay the amount due to the plaintiff and thus on the basis, it is the liability of the defendant no. 5 also. And therefore, plaintiffs have filed the present suit immediately to get such amount. Further since no amount has been paid to the plaintiff, plaintiffs have acquired the right to execute the sale deed of the said property as per the terms and conditions of the original agreements and writings entered into in favour of the plaintiffs. And therefore, alternative prayers also sought for.

2.12) It is the say of the plaintiffs that if the defendants do not pay the amount due to the plaintiff, then as per the conditions of the agreement, agreements of dtd. **28/03/1999** come into existence and on that basis, earlier decided by the elders of the defendant no.1, plaintiff have acquired the rights to sell the property mentioned in the suit for the full sale price amount. And therefore, the alternatively, the present suit has also been filed for special execution of those agreements in favour of the plaintiff. That the plaintiffs have always been and are still ready to execute all agreements made in their favour. Therefore, defendants are unwilling to perform their part of the contract. That the defendants are trying to escape from their responsibility and act against the right of the plaintiff. And therefore also the plaintiff has filed the present suit.

2.13) Further, in para -9 of the plaint it is mentioned details of debts as under :

Details of debts :

Amount to be paid by the defendant no. 3 & 4 as : Rs. 47,00,000/-
per the agreement executed in favour of the
Plaintiff.

Interest @ 18 % p.a. on the above stated : Rs. 16,92,000/-
amount -----

Total Rs. 63,92,000/-

2.14) It is further stated that, there is no question of canceling the principal contracts entered into in favour of the plaintiff without taking any consideration or canceling the rights in such principal contracts without taking any consideration or accepting reasonable consideration and the amount that have been paid by the plaintiffs to the original owner as well as the expenses incurred by the plaintiff for purchasing the said property etc., defendant no. 3 & 4 have decided to pay the amount to the plaintiffs, that defendant no. 3 & 4 are not allowed to carry out any transaction in respect of the suit property or make any construction or alteration in the said property apart from paying the amount decided to be paid to the plaintiff. That all the defendants have no right or authority to enter into any kind of contract or writings with any other person. If any agreements or writings are made in favour of another person accordingly, the plaintiffs' suit has no meaning and there are possibility of creating a situation where the order can not be implemented, if it is in favour of the plaintiff and hence, suit is also filed for permanent injunction. Therefore, plaintiffs have filed the present suit for the following prayers :

- (1) That it is hereby order the defendants to pay the amount of Rs. 63,92,000.00 to the plaintiffs individually or severally with interest @ 18 % p.a.
- (2) If the defendants will not pay the amount to the plaintiffs as per their liability, in that case, special execution be done in favour of the plaintiffs for the agreements executed on dtd. 03/09/1998 and 28/03/1999 and execute the sale deed of the said property as described in para no.1 of the plaint in favour of the plaintiffs and

against the defendants with costs.

(3) That permanent injunction be order to the plaintiffs that the defendants or their persons or agents or any other can not transfer or assign or can not execute any agreement or transaction or can not construct or alter in the said suit property.

(3) On behalf of the plaintiff, the Vakalatnama of the Ld. Advocate Mr. N.C.Shah was submitted vide Ex.2 along with the suit filed vide Ex.1 and thereafter, during the course of proceedings, on behalf of the plaintiff, the Ld. Advocate Mr. V.N.Tilokani has submitted his Vakalatnama.

3.1) Further, the plaintiff has filed interim injunction application vide Ex.5 under Order-39, Rule1-2 of C.P.C. along with the suit filed vide Ex.1, there after on initial stage, my Ld. Predecessor Judge had ordered to issue a show cause notice against the all the defendants, and thereafter during the course of proceedings, no one can appeared for plaintiff side for proceed this application below Ex-5, So My Ld. Predecessor Judge had passed order below Ex-5 for disposed it accordingly.

3.2) With plaint the plaintiff side produced an application under order-38, rule -5 for attachment suit properties before judgment,thereafter on initial stage, my Ld. Predecessor Judge had ordered to issue a show cause notice against the all the defendants, but thereafter the plaintiff side not make any attempt for proceed said application, so an application below Ex-6 is order to disposed by default accordingly.

3.3) Further, at the initial stage, after filing of the present suit as well as interim injunction application, the notice/summons has issued all the defendant's. The defendant's No.1/1 to 1/4 has reside at surat, so as per the order passed below Ex-23 the notice/summons is published by the plaintiff in the Local News papers of the Surat City and same has been produced by the plaintiff side on vide Ex-25. In-spite of the substitute

service of notice/ summons the defendant's No.1/1 to 1/4 are not appear before the court, so proceedings of this suits are trying ex-party against the defendant's No.1/1 to 1/4.

- 3.4)** The notice/summons is duly served on the defendant's No.2 to 5. The defendant No.4 i.e "Dulari Constrction" had appear though its partner Mr. Hiteshkumar Pravinchandra Shah. The defendant No.4 side Ld.Advocte Mr. P.R.Thakker has produced his vakalatnama on Ex-7 and also filed his written-statement on vide Ex-13, dtd.09-05-2003.

(4) Reply filed by the Defendant No.4 - (Ex-13)

- 4.1)** In this suit the defendant No.4 had filed his written statement on Ex- 13. In his written statement the defendant No.4 made para wise denial of the plaintiff suit as well as injunction application. In the written-statement of Ex-13 the defendant No.4 is especially made contention regarding registration of plaintiff firm. In para-6 of the written-statement the defendant No.4 stated that, the plaintiff firm is not registered as per the Partnership Act,1932, so as per the section-69 of the said act, the plaintiff firm is legally not capable to filed the present suit. Further in para NO-8 of the written statement on headings of the true fact, the defendant no.4 stated that, the disputed property at Vadodara, in Babajipura division, there is an open space and construction and a lime mill on Manekrao Road, the original owner was deceased Ramdas Bhai Patel and thereafter, Gangaben Ramdas Patel who is the widow became the owner of the property after his death.The original owner deceased Gangaben wants to sale this property and the present plaintiff firm wanted to buy it, therefore they entered into an agreement by making sale deed between them on **dt.3/9/1998**. There was no subject matter of survey numbers in it and in pursuance of the agreement, a the power of attorney has to be executed in favour of the plaintiff and also another agreement regarding the development of the same subject **dt. 28/3/1999** by the deceased Gangaben in favor of the plaintiff and the agreement

was also notarized. On consideration of the deed it appears that the value of the said property was fixed at Rs.15,00,000/- against which the plaintiff has paid Rs.100000/-. An very important condition of the agreement was that the remaining amount has to be paid within 15 months (by quarterly installments) from the date of agreement to the deceased Gangaben. As per the condition No. 12 of the said agreements, if the purchaser fails to pay the decided remaining amount within the time limit as specified in clause 12, the agreement will be considered as canceled and the amount paid under it will be considered as forfeited.

- 4.2)** The defendant No.4 further states that, it may be mentioned that if the said agreement is considered as canceled then the agreement regarding the power of attorney letter and the development contracts becomes not in existence. As per the agreement the plaintiff has to pay the remaining balance of Rs. 14,00,000/- within 15 months i.e; date 28/06/2000 with equated amount quarterly. However, if we look as per from Mark 4/12 to 4/14 , it clearly transpires that the plaintiff has paid a total amount of Rs.300000/- only from the date of agreement. Therefore, due to internal conflicts of plaintiff, the plaintiff failed to paid remaining amount within stipulated time period and were not able to follow the conditions of the said agreement. It is undisputed that the plaintiff has failed to make the full payment which was compulsorily required to be done by them within 15 months from the date of the agreement. In these circumstances, he was not in a position to comply with the agreement in the contract and since he did not pay the decided amount as per the mandatory terms of the contract, he is in material breach of the contract. So, as per clause 12, the agreement will be considered as canceled after dt.28/6/2000. As the matter cannot be determined, the suit of the plaintiff at prima facie liable to be rejected an no such relief can be sought by the plaintiff.

4.3) The defendant No.4 further stated that, plaintiff's were not in a position to execute and follow as per clause 12 of the agreement due to the financial condition of the current plaintiffs being not good and due to the lack of understanding between their partners, they were not in a position to pay the remaining amount of the agreement due to the recession in the market. Due to the tenants living in the property claimed for no rent, but because some portion is occupied by the tenants, it is not practical for them to develop the property. The plaintiff requested deceased Gangaben that they are not in a position to pay the arrears as per clause 12 of the agreement. Therefore, it is difficult to do any transactions to buy the property during recession period. As the plaintiffs are unable to complete the transaction, the plaintiffs have requested the deceased Gangaben to return all the sum of money paid to the deceased Gangaben, and requested to void all the agreements and agreed to Gangaben that plaintiffs will give in writing that the plaintiffs have no objection to the sale. Finally, deceased Gangaben accepted to return the said money to the present plaintiff and hence entered into an agreement on dt.24/1/2001 concluding the final agreement and in favor of the plaintiffs. An agreement was also made canceling the letter of Power of Attorney and also all the partners who were in the plaintiff firm in 1998 have also transferred all their rights to the property under suit and signed and gave in writing that their rights in the claimed property have been transferred, lease agreements, development agreements, development agreements, all those agreements have been canceled by all the partners of the plaintiff firm, and accordingly, the writings have been given by the plaintiffs that all the compensation which was paid to Gangaben, has been returned to the plaintiffs. An agreement in favor of deceased Gangaben has been measured by the present plaintiff and all those writings have been notarized. Not only that, but the stamps used in the writings were also purchased by the partners of the present plaintiff firm. Thus the plaintiffs does not have any share or interest in the suit property in any way. The present plaintiffs do not have any right or

interest in the suit property as on or before the date of suit, therefore the suit of the plaintiffs is clearly liable to be dismissed. Therefore, in the present situation, the said suit is liable to be dismissed. The plaintiff has concealed all the facts mentioned above in the present suit and the injunction against me in the charge of material facts the plaintiff has not brought it before the Hon'ble court with clean hands, therefore the plaintiff's suit and the said motions are liable to be dismissed with costs.

- 4.4)** The defendant No.4 further stated that, the present plaintiff showed his difficulty in fulfilling the conditions of the agreement and because he was struggling to pay the remaining amount, as stated above, he got back all the amount he had paid and canceled the agreement. Also, plaintiff was not made the payment within 15 months as per the clause of the agreement, since the said agreement has been canceled. It is said that the defendant No.4 is interested in buying the suit properties, so after discussion with deceased Gangaben, the sale price of the said properties was fixed at 20,00,000/- with defendant no 4. Finally, on dt.15/9/2000, deceased Gangaben Ramdas Patel entered into a deed of agreement to sale of the said properties in favor of the partnership firms of defendant no.4. As per the terms of the agreement, defendant No.4 had pay the remaining amount to deceased Gangaben. Deceased Gangaben, on the same day, executed a deed in favor of the defendant No.4 and possession of the property was handed over to defendant no. 4 along with the tenants. Later, on dt.15/9/2000, the deceased Gangaben made the sale agreement in favour of defendant no.4, and on the same day an amount of Rs.200000/- has to be paid to the deceased Gangaben as per the conditions of the agreement. And therefore, defendant no.4 entitled rights in the said property. When the existing agreements were executed, the present plaintiff showed the past contractual agreements made with deceased Gangaben in the past regarding ownership, letter of power of attorney and development-conflicts etc. After that, the plaintiff showed the history of the breach of

contract by non-payment for 15 months and the partners of the plaintiff firm dated 24/1/2000 by different agreements.

- 4.5)** The defendant no.4 further states that, after the death of Gangaben, her four sons, Vikambhai Rambhai Patel, Matulbhai Rambhai Patel, Bhupendra Rambhai Patel was became the owner of the suit properties which was received by inheritance. After the demise of Gangaben, her sons have given consent of the sale agreement and the letter of power of attorney. Therefore, on dt.17/10/2002, all four brothers have registered sale deed in favor of defendant no. 4. All the four brothers had registered sale deed in favor of Mr. Jitendra Ambalal Patel. Therefore all four brothers have registered sale deed in favor of defendant no. 4 and have complied with the original agreement that in the suit property.
- 4.6)** It is further stated that, after making the above agreements, the defendant No. 4 has submitted a lay-out plan to the Vadodara Municipal Corporation for development and has received the construction certificate on dated 10/1/2001 in the claimed property. The necessary expenses have been paid by the with regard to that development which was paid to tenants. The cost of maintenance of the said property is being borne by the defendant, and in the circumstances, the plaintiffs have no right or authority to make the present claim, therefore, the plaintiffs' claim is liable to be rejected.
- 4.7)** The defendant no.4 further states that, it is a fact to be mentioned that when defendant No. 4 required finance to develop this property, he obtained the necessary finance from defendant No.5, and as per the instruction of defendant No.4, the defendant No.2 Jitendra Ambalal Patel, has executed registered agreement in favour of the defendant No.5. However, it has been measured that the defendant no.5 has no interest in developing the property or they have no vested interest in the sale of the property but they are interested in the property for the

security of their money. Even so, the plaintiffs have no right in the suit property due to the fact that the plaintiffs have no right or authority to prevent the defendant No.4 from doing any business.

4.8) Further, the defendant No. 4 has stated that, since he has never made any commitment or entered into any agreement with the present plaintiff. A huge amount of agreement on a scrap paper, which is not in the form of an agreement, is not to be measured . The plaintiff has also made all transactions on a registered paper till the date, so there is no way for the plaintiff to transact such a large amount of money on a piece of paper. That cannot be logically believed. Therefore, the claim made by the plaintiffs is liable to be dismissed. In the circumstances where the present suit is principally for recovery by the plaintiff, according to Civil Pr. Code Order 39 Rule 1 - 2, if they are not awarded the decree as sought, there will be no pecuniary loss and clearly equitable relief to the plaintiff. As there is no authority to obtain, the injunction is prima facie voidable. Plaintiff has concealed the material facts and misled the court by misrepresenting the material facts in the suit, The entire claim of the plaintiff is groundless, therefore, in view of all the facts, the plaintiff's claim must be dismissed with costs in the interest of justice.

4.9) Further, the defendant No. 4 has stated that, the plaintiffs have no prima facie case. Balance of convenience is not in favor of the plaintiff. If the injunction sought by the plaintiff is to be measured, the suit property cannot be developed. The public has booked some units of Building and according 22 persons have booked and the right of 22 persons has been raised in said property. The multiplicity of litigation is such that 25 persons suffer loss and their rights are harmed, the balance is in favor of the defendant. so it is preyed for dismissed present suit of the plaintiff's.

(5) During the trial of suit, the plaintiff has filed an application on Ex-48 under order-6 rule-17 of the code of civil procedure. In this application it

is stated that, during the pendency of the present suit the defendant No.4 in order to deprive the right of the plaintiff instituted suit against defendant No.1/1 and 1/4 as Special Civil Suit No.440 of 2013 and then after in collusion with each other got compromise decree and upon said decree filed Special Execution Petition No.86 of 2013 and by appointing court commissioner got executed sale deed on dt.13-05-2014 and therefore it is required to insert and relief if requested to get declaration that, sale deed executed on dt.13-05-2014 in favour of defendant No.4 is illegal and required to be canceled. Against this application of Ex-48 the defendant No.4 had filed his reply on Ex-55 and thereafter my Ld. predecessor Judge has passed order on dt.30-10-2018 for rejected said application.

5.1) Further, during the trial of the suit the plaintiff No.1/3 Mr. Anilbhai Gordhanbhai Prajapati is died, died, therefore his legal heirs No. 1/3/1 to 1/3/3 has been joined as per the application filed to join the legal heirs of defendant No.1/3 vide Ex.64.

(6) From the above pleadings, following issues have been framed by my Ld. Predecessor Judge in vernacular language vide Exh.37.

:- Issues :-

૧) શું વાદી પુરવાર કરે છે કે, પ્રતિવાદી નં.૧ ના માતા ગંગાબેને તા.૦૩/૯/૧૯૯૮ ના રોજ બાનાખત કરાર દાવાવાળી મિલકત અંગે રૂ.૧૫,૦૦,૦૦૦/- વેચાણ કિંમત નક્કી કરી, રૂ.૧,૦૦,૦૦૦/- બાનામા સ્વીકાર કરી આપેલ ?

(Whether the plaintiff proves that, mother of the defendant No.1 deceased Gangaben had execute sale agreement upon consideration of Rs.15,00,000/- and received earnest money of Rs.1,00,000/-?)

- ૨) શું વાદી સાબિત કરે છે કે, તેઓ દાવાવાળી મિલકત અંગે કરારનું વિશિષ્ટ પાલન પ્રતિવાદીઓ પાસે કરાવવા હકકદાર છે?
- (Whether the plaintiff proves that, they are entitled to get decree of specific performance of contract against the defendant's ?)
- ૩) શું પ્રતિવાદી સાબિત કરે છે કે, વાદીએ દાવાવાળી મિલકત અંગે થયેલ કરાર મુજબ બાકી અવેજની રકમ ચુકવવામા વાદી નિષ્ફળ ગયેલ છે ?
- (Whether the defendant prove that, as per the sale agreements of the suit properties, the plaintiff failed to paid balance amount ?)
- ૪) શું પ્રતિવાદીઓ સાબિત કરે છે કે, તેઓએ બાનાખત અને કુલમુખ્ત્યારપત્ર રદ કરતા કરારો કરેલ છે?
- (Whether the defendant's prove that, they executed contract for cancellation of sale agreements and power of attorney ?)
- ૫) શું પ્રતિવાદી નં.૪ સાબિત કરે છે કે, તેઓ વાદી પેઢીને કોઈ નાંણા ચુકવવા જવાબદાર નથી?
- (Whether the defendant No.4 proves that, they are not responsible to paid any money to the plaintiff ?)
- ૬) શું વાદી બાનાખતનો વિશેષ અમલ કરવા તૈયાર અને રાજી હતા અને છે?
- (Whether the plaintiff is ready and willing to perform his part of the contract ?)
- ૭) શું વાદી માંગ્યા મુજબની દાદ મેળવવા હકકદાર છે ?
- (Whether the plaintiff entitled for decree as prayed for?)

૮) શું હુકમ ? શું હુકમનામું ?

(What order and decree ?)

6.1) The findings of the above issues are as under :-

1. In Negative.
2. In Negative.
3. In Negative.
4. In Negative.
5. In Negative.
6. In Negative.
7. In Negative.
8. As per the final order.

(7) In the present suit, the plaintiff and defendants has produced the following oral as well as documentary evidences to prove their case.

Oral Evidence on behalf of the Plaintiff :-

Sr. No.	Exh.	Particular
1	73	Deposition in form of Affidavit of plaintiff No.1/2 Mr.Bakulbhai Hasmushbhai Vakil.

Documentary Evidence on behalf of Plaintiff :-

Sr. No.	Exh.	Particular	Date
1	86	Plaintiff's partnership firm receipts of its registration- Xerox true copy.	16/12/1998
2	87	Sale agreements. -Simple xerox copy.	28/03/1999
3	88	Development agreement of suit properties.- Xerox true copy.	28/03/1999
4	89	Possession receipts. Xerox true copy.	28/03/1998
5	90	Copy of power of attorney - Xerox true copy.	28/03/1999
6	91	Agreement of sale - Xerox true copy.	03/09/1998

7	92	Development agreement of suit properties.- Xerox true copy.	03/09/1998
8	93	Possession receipts. Xerox true copy.	03/09/1998
9	94	Copy of power of attorney - Xerox true copy.	03/09/1998
10	95	Consent letter given by Gangaben Patel regarding payment of consideration - Xerox true copy.	03/09/1998
11	96	Xerox copy of Four cheque.	02/09/1998
12	97	Xerox copy of Three cheque.	10/05/1999
13	98	Xerox copy of Three cheque.	10/05/1999
14	99	Xerox true copy of Voucher	09/06/1999
15	100	Xerox copy of Two cheque.	15/05/1999
16	101	Permission letter of Fire Department Vadodara - Xerox copy	21/ /1999
17	102	N.O.C.given by Airports authority of India Xerox copy	12/04/1999
18	103	Compromised Pursis produce in rent suit no. 503/1998 - Certified Copy	05/12/1998
19	104	Receipt of Sub Register Office regarding Discovery of Documents - Original	10/04/2003
20	105	Agreement of Assignment in favour of plaintiff firm - Xerox true copy	24/01/2000
21	114	Closing Pursis	23/02/2024

Documentary Evidence on behalf of the defendant :-

- 7.1) In this suit the defendants side has not produce any oral as well as documentary evidence. At the stage of the cross-examination of the plaintiff No.1/2, this court issued notice to the all the defendants, but non of the notice served of the defendants. This court also given an oral instruction to the Ld. Advocate of defendant No.4, but he also not like to present in this matter and proceeded further, so looking to the continued absent of the defendants side this court has passed order below ex-1 for closed right to file evidence of defendants. Thereafter, also defendant

side has not filed any application for re-open his rights to file evidence.

(8) Final Arguments :-

8.1) The Ld. Advocate Mr.V.N.Tilokani has submitted his oral arguments, in his argument Mr.V.N.Tilokani stated that, plaintiff firm has been filed this suit for specific performance of agreement for sale as well as recover sums of Rs. 63,92,000/- against the defendants. The defendant No. 1 deceased Gangaben Ramdas Patel is original owner of suit properties and she execute agreement for sale in favour of plaintiff firm for consideration of Rs. 15,00,000/-. The plaintiff firm had paid Rs. 3,00,000/- as earnest money to the original owner of suit properties. The deceased Gangaben also execute development agreement and power of attorney in favour of plaintiff firm. By this agreement the plaintiff firm applied for gating necessary permission in different Government authorities and also got necessary permission from the Airport Authority of India and fire Department, Vadodara City. After the above agreement for sale the plaintiff firm had assign to transfer its rights, interest in suit properties in favour of defendant No. 3 and 4 and that regard the plaintiff firm and defendant No. 3 and 4 had made one agreement for transfer plaintiff interest in favour of defendant No. 4 for consideration of Rs. 50,00,000/-. The defendant No. 3 and 4 are jointly paid sums of Rs. 3,00,000/- and remaining balance amounts of Rs. 47,00,000/- is Not paid by defendant No. 3 and 4. The original owner of suit properties are handed over possession to the plaintiff firm. The plaintiff firm have legal possession on suit properties till today. The defendant No. 3 and 4 are illegally and without payment of Rs. 47,00,000/- to the plaintiff firm executed some sell agreement in favour of defendant No. 5. The defendant No. 3 to 5 are not having any legal rights and interest regarding suit properties. In this suit the plaintiff side Mr. Bakulbhai Hasmukhbhai Patel has filed his written chief-examination on ex-73. The defendant side no one can appeared and cross-examine the above plaintiff. In this suit the plaintiff side also produced necessary

documents. The plaintiffs firm are duly registered as per the partnership act, the receipt of plaintiff firm registration is produced on ex-86. In this suit the defendant side not produced any oral as well as documentary evidence so defendants are fail to prove their defense. So looking to the facts and evidence produced by the plaintiff side it is prayed to grant present suit in favour of plaintiff firm.

- 8.2) After the above oral arguments by Ld. Advocates for plaintiff side, this suit are adjourned for final arguments of defendant side, but no one can appeared for defendant side, so this court has passed order below ex-1 for closed right of final argument of defendants.

: R E A S O N S :

(9) ISSUE NO.1, 2 and 6 :-

Issues No. 1, 2 and 6 are inter-connected to each other and, therefore, to avoid repetition and for the sake of brevity as well as to save precious time of the Court, they all are being discussed and decided together.

- 9.1) The phrase “**burden of proof**” has not been defined in the Indian Evidence Act. This phrase has two distinct meanings. In the first sense, it means the burden of establishing a case and in the second sense, the burden of introducing evidences. The essential distinction between these two is that the former never shifts and remains throughout the entire case, while the latter shifts from time to time as the case proceeds. The initial burden of proof would be on the plaintiff in view of section 101 of Evidence Act. The elementary rule is section 101 is inflexible. In terms of section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances if any, which would dis-entitle the plaintiff to the same.

9.2) The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, section 3, a fact is said to be proved when the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the Court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies.

9.3) In case of **DEVSHI GANGAJI RABADIYA Versus JAYANTIBHAI JERAMBHAI SUREJA & 2 OTHER(S) R/SECOND APPEAL NO. 143 of 2016 Date : 16/09/2022** Hon'ble Gujarat High Court held that.... It is also Well Settled Legal dictum that assertion made in the plaint is not a proof and hence the burden lay upon the plaintiff to prove the facts and averments made in its plaint even if there is no written statement filed by the defendants to the contrary averments or any evidence or rebuttal. Even in absence of written statement, it is for the plaintiff to prove its case. the plaintiff cannot succeed merely because there is absence of written statement filed by the defendants or there is no rebuttal evidence produced by the other side.

9.4) In case of **PATEL RAMANBHAI MATHURBHAI Vs GOVINDBHAI CHHOTABHAI PATEL & 3 R/SECOND APPEAL NO. 211 of 2018** Date : **05/09/2018** Hon'ble Gujarat High Court has held that.....

41. It is one of the fundamental principles of the law of evidence in India that a party on whom burden of proof lies must discharge it by bringing the best evidence available before the Court and where a party does not do so, the Court will be justified in concluding that it would, if brought, not support the case of the party. There is no presumption that an act was done, of which there is no evidence, and the proof of which is essential to the case raised.

54. The 'burden of proof' means a party's duty to prove a disputed assertion or charge. The 'burden of proof' includes both 'burden of persuasion' and the 'burden of production'. The 'burden of persuasion' means the duty imposed on a person to convince the fact finder to view the facts in a way that favours that person. The 'burden of production' is the duty imposed on the person to introduce enough evidence on a issue to have the issue decided by the fact finder, in that person's favour. The party having the 'burden of proof' must introduce some evidence if he wishes to get a certain issue decided in his favour. The 'burden of proof', therefore, denotes the duty of establishing by a fair preponderance of the evidence the truth of the operative facts upon which the issue at hand is made to turn by substantive law (Black's Law Dictionary, 7 th Edition).

56. The principles discernible from the above referred decisions may be summarized as under:

[a] The general principles of law that can be gainfully culled out from the judicial pronouncements noted above is that the burden of proof cast under Sections 101 and 102 of the Indian Evidence Act, 1872 is the persuasive burden or the onus probandi. The persuasive burden to prove and establish the case always lies upon the plaintiff and the said burden never shifts upon the defendant. What may, however, shift is the onus to lead evidence in the sense that once the plaintiff side succeeds

in prima facie establishing his pleaded case by leading evidence, the onus will then shift upon the defendant side to lead evidence so as to disprove the case. The parties may also have to discharge the burden of establishing the admissibility of the evidence by leading evidence in respect thereof. The initial burden to establish the basic allegations made in the plaint constituting the foundational facts, regardless of whether such assertion is couched in the affirmative or in the negative, would undoubtedly lie upon the plaintiff and the failure to discharge the said burden must lead to the dismissal of the suit."

[b] The burden of proof on the pleadings should not be confused with the burden of adducing evidence.

[c] Pleading is not evidence, far less proof.

[d] The rule that the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it, is not one of the universal applications and there may be exception thereto.

[e] The inference of fraud can be drawn only from the positive materials on record and cannot be based on speculation and surmises. However, the suspicious circumstances, however, strange the coincidences and however grave the doubts, they alone cannot take place of proof of fraud.

[f] The evidence of fraud must be sufficient to overcome the natural presumption of honesty and fair dealing. It is not to be presumed or inferred lightly.

[g] Hence the plaintiff comes before the Court with a case of forgery, then he has to prove the forgery in accordance with law. A mere assertion or allegation of forgery is not sufficient to shift the onus on the other side to establish that there is no forgery.

[h] It is always open to the defendant not to lead any evidence where the onus is upon the plaintiff. After having gone into the evidence, he cannot ask the Court not to look at it and act on it. The question of burden of proof at the end of the case when both the parties have

tendered evidence is not of any great importance and the Court has to give a decision on a consideration of all the materials.

- 9.5)** Considering the aforesaid scope and ambit of Sections 101 and 102 of the Indian Evidence Act, 1872, if we peruse the pleading of the parties we may find that, the plaintiff has filed the suit against the defendants and sought a decree of specific performance, declaration and perpetual injunction in respect of the suit properties. It is the case of plaintiffs that, the defendant No.1 is the original owner of the suit properties has executed an agreement to sell in favour of the plaintiff firm and accepted the part payment of the sale consideration and after accepting part payments of earnest money handed over the possession of the suit properties to the plaintiff firm. Further it is the case of the plaintiff that, the plaintiff firm had assigned to transfer its rights, interest in suit properties in favour of defendant No. 3 and 4 and that regard the plaintiff firm and defendant No. 3 and 4 had made one agreement for transfer plaintiff interest in favour of defendant No. 4 for consideration of Rs. 50,00,000/-. The defendant No. 3 and 4 are jointly paid sums of Rs. 3,00,000/- and remaining balance amounts of Rs. 47,00,000/- is not paid by defendant No. 3 and 4. The plaintiff firm have legal possession on suit properties till today. The defendant No. 3 and 4 are illegally and without payment of Rs. 47,00,000/- to the plaintiff firm executed some sell agreement in favour of defendant No. 5. The defendant No. 3 to 5 are not having any legal rights and interest regarding suit properties.
- 9.6)** Whereas, the defendant No.4 took the contention and defence that, the plaintiff firm has failed to comply with the terms and condition of the agreement of sell as plaintiff firm failed to pay the balance amount of the sale consideration as mentioned in the agreement to sell, so original owners are terminated the said agreement and thereafter suit properties was sold to the defendant No.4. Therefore, the plaintiff firm is not

entitled to ask any relief with regard to the suit properties as he did not fulfill his part of the contract.

- 9.7)** Considering the aforesaid gist and crux of the matter, if we go through the oral as well as documentary evidence produce on the record by the parties, especially the evidence in the nature of pleadings, we may find that the averment of the plaint are not admitted by the defendant No.4, and in written-statement (Ex-13) the defendant No.4 denied each and every averment of the plaintiff.
- 9.8)** In order to substantiate and fortify the pleadings in the plaint, the plaintiff has filed written-examination-in chief of Mr. Bakulbhai Hasmukhbhai Vakil at Ex.73 with the documentary evidence of Ex-81. This court has passed order to be exhibited said documents on condition to prove the same and give Ex-86 to 105. Further, looking to the facts of the case after the filing of documentary list on Ex-81 dt.29-01-2020, the Ld. Advocate for the plaintiff had repeatedly filed adjournment application on Ex-74,75,76,77,78,79 for reasons of receive original documents from the plaintiff and thereafter produce same in the suit. Further, on Ex- 80 the Ld. Advocate for the plaintiff side given an adjournment application and stated that, since the original documents are not available with the plaintiff and the certified copies of the original documents are to be obtained from the office of the Sub-Registrar, so requested to adjourn this matter. Further, on next date the Ld. Advocate for the plaintiff side filed another adjournment application on Ex-81 by reasoning that, the original documents are lost and despite many searches the documents are not found so that a complaint would be made in the police station in this regard, and it is requested to give some time.
- 9.9)** Considering the above averment made by the Ld. Advocate for the plaintiff side in his various adjournment applications, if we peruse the entire case record it is found that, the plaintiff side had not produced any

certified copy of the said documents nor produced any copy of the police complaint regarding stolen of the documents. In this suit except document of Ex-103 i.e certified copy of the compromise in Rent suit no. 503/1998, no any of the original or certified copy of the any documents is produced from the plaintiff side.

9.10) Further, looking to the fact and circumstances of the matter, the plaintiff side not filed any application under Section 65 of the Evidence Act for seeking permission to prove the documents by way of secondary evidence. As a general rule, documents are proved by leading primary evidence. Section 64 of the Evidence Act provides that documents must be proved by the primary evidence except in cases mention in Section 65 of the Evidence Act. In the absence of primary evidence, documents can be proved by secondary evidence as contemplated under Section 63 of the Act which reads as under: -

"Secondary evidence means and includes-

- (1) certified copies given under the provisions hereinafter contained;
- (2) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.
- (3) copies made from or compared with the original ;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a documents given by some person who has himself seen it.

Illustration:

- (a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.
- (b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original."

9.11) Section 65 of the Evidence Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation Section 65 of the Act is quoted herein below:-

"65. Cases in which secondary evidence relating to documents may be given: Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-

(a) When the original is shown or appears to be in the possession or power- of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents

which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

9.12) The pre-conditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted.

9.13) In the case of **Rakesh Mohindra Versus Anita Ber 2015 (0) AIJEL-SC 57295** Hon'ble Supreme Court of India held that,

"22. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an

exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law."

9.14) In the case of **M. Chandra vs. M. Thangamuthu, (2010) 9 SCC 712**, Hon'ble Supreme Court of India considered the requirement of Section 65 of the Evidence Act and held as under:-

"47. We do not agree with the reasoning of the High Court. It is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasised that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party."

9.15) The duty is cast upon every court to examine every document that is sought to be marked in evidence. The nomenclature of the document is not decisive. The question of admissibility will have to be decided by reading the document and deciding its nature and classification. Even while recording ex-parte evidence or while recording evidence in the absence of the counsel for the other side, the Court should be vigilant and examine and ascertain the nature of the document proposed to be marked and ensure that it is a document which is admissible. The Court should not depend on the objections of the other counsel before considering whether the document is admissible in evidence or not.

9.16) The objections as to the admissibility of the documents in evidence may be classified into two classes; (I) an objection that the document which is sought to be proved is itself admissible in evidence and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case merely because a document has been marked as an exhibit and objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the later case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular, cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. It is the duty of a Court of Law to exclude all irrelevant or inadmissible evidence even if no objection has been taken by the opposite side.

9.17) In the aforesaid context, I may look into the provisions of Order 13 Rule 4 of the CPC. Order 13 Rule 4 reads thus:-

"Endorsements on documents admitted in evidence:-

(1) Subject to the provisions of the next following subrule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :-

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted, and the endorsement shall be signed or initialed by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on

the copy and the endorsement thereon shall be signed or initialed by the Judge.

9.18) Rule 14 of Order 7 CPC enjoins upon the plaintiff to produce a list of documents along with the plaint if he wants to rely on any documents. The documents are often annexed to the pleadings filed in the court. In the civil suits, these documents are looked into by the court for the purpose of determining the rights and liabilities of the parties to the suit proceedings. The documents merely annexed to the pleadings cannot be considered by the Court at the final hearing of the suit. The parties must take steps to have their documents admitted into evidence. In other words, to get them "marked" as exhibits by the Court and to then prove those documents according to law. Such exercise is carried out under Order 13 Rule 4(1) of the CPC referred to above.

9.19) It is a settled position of law that mere marking of a document as an "exhibit" would not be sufficient to treat it as admitted in evidence. Merely because the endorsement mentioned in O. 13, R. 4 of the CPC, has been made upon a document-an endorsement which purports to admit the document in evidence-it was admitted in evidence. In the specific context of secondary evidence admitted by marking exhibits without any foundation for leading the secondary evidence having been laid in the Affidavit in lieu of the Examination in Chief, Hon'ble Gujarat High Court in **Kalidas v Babaldas, reported in (1993) 2 GLR 1645** has held that "Section 65 of the Indian Evidence Act is clear that that no secondary evidence could have been permitted to be led without laying any foundation therefor as provided under Section 65 of the Evidence Act."

9.20) In case of **Akbarbhai Kesarbhai Sipai vs Mohanbhai Ambabhai Patel, [C/SA/183/2014]** Hon'ble Gujarat High Court has reiterated that a person proposing to give secondary evidence by invoking clauses (a),

(b) and (c) of Section 65 of the Evidence Act, has to first lay a foundation to the effect that the document is not in his possession and has not been produced in spite of a notice by the person who is in possession of the same; that the existence, condition or contents of the original have been proved to be admitted in writing or that the original has been destroyed, lost or cannot be produced, respectively.

9.21) Hon'ble Supreme Court in **H. Siddiqui v. A. Ramalingam, (2011) 4 SCC 240 : (2011) 2 SCC (Civ) 209**, relying on several of its previous decisions and various High Court has held that it was the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making an endorsement thereon. The relevant passage is reproduced hereunder;

"12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law.

9.22) The Plaintiff no.1/2 has tendered his examination-in-chief in the form of an affidavit at Exhibit-73 and other documents at Exhibits-86 to Exhibit-105. This court has passed an order below Exhibit-72 that "The documentary evidences at mark-71/1 to 71/20 referred to in the affidavit be exhibited on the condition to prove same. But, the plaintiff has not

proved any of the said documents before the this court. Most of the documents, submitted by the plaintiff, are the xerox copies and none of the said documents have been proved by the plaintiff in accordance with the provisions of the Evidence Act.

9.23) In the plaint, I do not find any pleadings as to why Xerox copies of the documents are being relied upon. In other words, there are no pleadings to lay a foundation for the purpose of adducing secondary evidence. There is nothing to indicate in the plaint nor in the examination-in-chief of the plaintiff as to in whose possession the original documents are and in what manner, the xerox copy were obtained. To put it in other words, the plaintiff could be said to have failed to explain as to what were the circumstances under which the xerox copies were prepared and who was in possession of the original documents at the time its xerox were taken, so documents which are the produced by the plaintiff side is not admissible as secondary evidence. On considering the fact of the case the plaintiff is failed to prove documentary evidence in accordance with the provisions of the Evidence Act.

9.24) The present suit was filed by the "Santi Contruction" a partnership firm against the defendant's. In the written-statement of Ex-13 the defendant No.4 is especially made contention regarding registration of plaintiff firm. In para-6 of the written-statement the defendant No.4 stated that, the plaintiff firm is not registered as per the Partnership Act,1932, so as per the section-69 of the said act, the plaintiff firm is legally not capable to filed the present suit. Looking to the contention made by the defendant side in written-statement it is necessary to reproduced here section-69 of the **Indian Partnership Act,1932** as under :

69. Effect of non-registration.—

(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be

or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect,—

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909) or the Provincial Insolvency Act, 1920 (5 of 1920) to realise the property of an insolvent partner.

(4) This section shall not apply,—

(a) to firms or to partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories, are situated in areas to which, by notification under section 56, this Chapter does not apply, or

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (5 of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

9.25) As per the section 4 of the Partnership Act defines the term 'Partnership' as the "relation between the persons who have agreed to share the

profits of a business carried on by all or any of them acting for all". It further states that "persons who were entered into partnership with one another are called individually 'partners' and collectively 'firm', and the name under which their business is earner on is called the 'firm name'". Thus, a firm is not a separate legal entity, but, is .only a collective or compendious name for all the partners. So, if asuit to enforce a right arising from a contract is -to be instituted "by a firm" against a the party, the firm would be the plamtiff. If the suit is to be instituted "on behalf ' of a firm, the partner or partners, who wants or want to institute the suit on behalf of (i.e. for the benefit of) the firm would be the plaintiff. But, in both the cases, the suit would in effect be by or on behalf of all the partners of the firm. Section 69(2) lays down that the suit of the nature mentioned above can be instituted only if (a) the firm is registered, and (b) the persons suing are or have been shown in the Register of Firms as partners in the firm. The firm must be a registered firm by the date of the institution of the suit and the persons suing (i.e. all the partners) must have been shown in the Register of Firms as partners of the firm by the date of the institution of the suit. This appears to us to be the plain meaning of Section 69(2).

9.26) The present suit is filed by the "Santi Contraction" a partnership firm for specific performance of the agreements for sell, so undoubtedly, Section 69 is mandatory in character and its effect is to render a suit by plaintiff in respect of a right vested in him or acquired under a contract which he entered into as a partner of a firm, whether existing or dissolved void. In other words, a partner of an erstwhile unregistered partnership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of the main part of Section 69(3) of the Act.

9.27) The Ld.Advocate for the plaintiff side in his oral arguments refer the documents of Ex-86 i.e xerox copy of plaintiff's partnership firm receipts of its registration. As per the discussion above the plaintiff was not

produced any original or certified copy of said receipts nor given any kind of the explanation for non production of original or certified copy. Further, with the receipts of the applying for registration, the plaintiff side also produced the unregistered partnership deed. On perusal of the said xerox copy for receipts of the applying for registration it is not prove that, at the time of the filing of the present suit the plaintiff firm is duly registered as per the Partnership Act,1932.In this suit the plaintiff firm failed to established that, at the time of filing of present suit the plaintiff firm is duly registered as per the Indian Partnership Act, 1932, so suit filed behalf of the unregistered partnership firm is bar by the section-69(2) of the Partnership Act,1932 and it is not maintainable.

9.28) According to the case of the plaintiff firm, they has performed thier part of the contract and plaintiff firm was and is ready and willing to performed its part of the contract. Whereas, the defendant no.4 has specifically denied and also mainly contended that the plaintiff was and is never ready and willing to execute registered sale deed by making or paying the balance amount of the sale consideration. To substantiate the pleadings and the evidence aduced by the plaintiff side, we will to have see the provision of the section-16 of the Specific Relief Act,1963 is reproduced here :-

16. Personal bars to relief.—

Specific performance of a contract cannot be enforced in favour of a person—

- (a) who would not be entitled to recover compensation for its breach; or
- (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
- (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract

which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
- (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

9.29) If we go through the aforesaid provisions, it clearly appears that the aforesaid provision is mandatory and failure of plaintiff to comply with any of the requirement would dis-entitle him to get relief of the specific performance of contract. Section- 16(c) of the Specific Relief Act, 1963 says that the specific performance of contract cannot be enforced in favour of a person who fails to aver and prove that he has performed and has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms of the performance of which has been prevented or waived by the defendant. Therefore, the plaintiff was required to aver that he has always been ready and willing to perform the essential terms of contract. Repudiation of the contract by the defendant does not relieve the plaintiff of his obligation. "Ready" means prepared or having all preparation made to do something and "willing" means having a ready will. In suit for specific performance of contract, the requirement of section 16(c) of the act as to averments and proof of plaintiff readiness and willingness to perform his part of the contract is a mandatory one.

9.30) It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under sec. 20 of the Specific Relief Act 1963. Under sec. 20, the court is not bound to grant the relief just because there was valid

agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract.

9.31) Now, whether the plaintiff firm was and is ready and willing to perform his part of the contract or not, is required to be decided from the material available on record. According to the provision of the section-16(c) of the Specific Relief Act.1963, it is the duty of the plaintiff to prove and show that he was and is ready and willing to perform his part of the contract. To prove the same, if we carefully peruse the documents Ex-91 i.e agreement of sell dt.03-09-1998, we may find that, as per the condition No.3 the plaintiff firm is bound to pay balance amount of sale consideration within 15 months of the said contract to the original

owners of the suit properties. Further, as per the condition No.12 of the said agreement if the plaintiff firm has failed to perform his part of the condition no.3 and failed to pay balance amount within stipulated time period within the 15 months, the agreement will be considered as canceled and the amount paid under it will be considered as forfeited.

9.32) On considering aforesaid terms and condition of the above agreement if we carefully peruse the entire evidence produced by the plaintiff, it is not produced any documentary evidence to show that, as per the condition no.3, the plaintiff firm was ready to paid remaining balance amount to the original owners of the suit properties within stipulated time. On parusal of the pleadings of the plaintiff its transpire that, after sale agreement with the original owner, the plaintiff firm was executed one agreement in favour of the defendant No.4 and assigned its interest over the suit properties in favour of the defendant No.4.so it is assume that, the plaintiff firm is not interested to execute sale deed of its own name. The analysis of evidence would also point out that the plaintiff was not try to paid remaining balance amount to the original owners of the suit properties nor issued any notice for received balance amount and execute the sale deed to name of the plaintiff firm, so it is prove that, the plaintiff firm is failed to perform its parts of the contract. In this suit the plaintiff firm failed to prove his pleading by produced necessary documentary evidence, Hence i answer the issue No.1,2 and 6 are **"In Negative"**.

(10) ISSUE NO.3 to 5 :-

10.1) In this suit the burden lies on the defendant to prove above issues. The defendant No.4 filed his written- statement on Ex-13. For supporting of his written- statement the defendant No.4 does not produced any oral as well documentary evidence. Hence, i answer the issue No.3 to 5 are **"In Negative"**

(11) ISSUE NO. 7 :-

11.1) On appreciation of entire evidence on record, the documents which are the produced by the plaintiff side is not admissible as secondary evidence. On considering the fact of the case the plaintiff is failed to prove his case by documentary evidence in accordance with the provisions of the Evidence Act. Further the plaintiff has not succeed to establish any rights over the suit properties and totally failed to establish his case. Hence my reply to issue **No. 7 is in Negative** and following final order is passed in the interest of justice.

- : ORDER :-

- 1) Plaintiff's suit is hereby ordered to be rejected.
- 2) No order as to costs.
- 3) Decree be drawn accordingly.

Signed and pronounced in the open Court to-day on this 29th day of February, 2024.

Date : 29/02/2024
Place : Vadodara

(D.H.Khambhati)
3rd Additional Sr.Civil Judge
Vadodara.
Judge Code : GJ-00866