Registered on	: 21.10.2022
Received on	: 21.10.2022
Decided on	: 30.10.2023
Duration	: Y. M. Ds.
Exh. No.	:

IN THE COURT OF 3rd ADDITIONAL DISTRICT JUDGE, at GONDAL, DISTRICT RAJKOT

REGULAR CIVIL APPEAL NO.28 OF 2022

APPELLANT (ORI. DEFENDANT):-

1. **LAKHABHAI NAGJIBHAI BHUVA**
   Age: Adult, Occu.Agricultural-work, Religion: Hindu,
   Resi. Mota Dadva, Shivaji Nagar, Tal.Gondal Dist.Rajkot

V E R S U S

RESPONDENT (ORI. PLAINTIFF):-

1. **DEVAYATBHAI LABHUBHAI KARETHA**
   Age: 28, Occu. Agricultural-work,
   Religion: Hindu,
   Resi. New Sagar Society, Street no.9, Kothariya Road, Rajkot.

Regular Civil Appeal

under section 96 OF Civil Procedure Code

Appearance:-
Ld. Adv. Shri R. B. PADSHALA for the Appellant
Ld. Adv. Shri R. B. CHAVDA for the Respondent
==

-// J U D G M E N T \\-

[1] This appeal seeks to challenge judgment and decree passed by Ld. Addl. Senior Civil Judge, Gondal in Regular Civil Suit no. 93 of 2016 on 22.09.2022, whereby the suit for specific performance of agreement filed respondent herein was decreed and the appellant herein was directed to execute sale deed in respect of suit property after accepting the remaining amount of consideration. The appellant herein was also permanently prohibited from transferring the suit property by any means whatsoever.

[2] The appellant herein was defendant before the Ld. trial Court and respondent was plaintiff before the Ld. trial Court; henceforth for the sake of brevity and convenience, the parties to this appeal shall be referred to in accordance with their respective status before the Ld. trial Court.

[3] The suit underlying this appeal is based on a registered agreement to sell executed by defendant in favour of plaintiff on 15.04.2014 registered at Sr. No. 983 at the office of Sub-Registrar, Gondal, in respect of agricultural property of old tenure bearing Revenue Survey no. 253 paikee 1, village account no. 1764 of village Mota Dadva of Gondal Taluka, admeasuring 2-54-63 Sq. Mtrs., known as Hanakpati in the revenue records. The details of property are mentioned in para-1 page-2 of the plaint, and the said property is henceforth referred to as the suit property. The suit was filed for specific performance of agreement, declaration and permanent injunction on 06.04.2016 with a contention that as per the agreement the suit property was agreed to sold to the respondent for consideration of Rs.3,50,000/- out of which Rs.1,50,000/- was paid as earnest money at the time of execution of agreement and the plaintiff was ready and willing to pay the remainder amount of consideration, being Rs.2,00,000/-, and accordingly offered the said amount but the appellant did not agree to accept the said amount and execute registered sale deed as per the agreement and thus the defendant failed to perform his part of the contract, therefore the suit underlying this appeal was filed.

[4] The defendant resisted the suit by filing written statement at Exhibit-15, contending that defendant was in dire need of funds to the tune of Rs. 3,00,000/- as he had made huge loss in gambling and was not in a position to confront about it to his family and therefore he approached a person named Dhanji Devshibhai Hirpara of village Jasdan and the defendant was told to get papers of his property so that Mr. Dhanjibhai Hirpara can arrange to get money on interest for the defendant and accordingly the defendant village form no. 7-12 abstract of his property and he was told by Mr. Dhanjibhai Hirpara plaintiff would lend him Rs. 3,00,000/- and for that purpose the defendant will have to come to Gondal alongwith his photograph and identification proof and accordingly the defendant went to Gondal and appended his signature on the deed that was brought by plaintiff. It is also contended that defendant paid interest over the said amount to plaintiff at 2% per month at Murlidhar Pan Stall located on Kothariya Road, Rajkot and thereafter on 19.02.2015 the amount lent by plaintiff was returned in full from the amount received from sale of agricultural produce (cotton) but as Mr. Dhanjibhai Hirpara was not present, the defendant could not the said agreement cancelled and plaintiff gave assurance that when Dhanjibhai would come he would return the original agreement and also execute cancellation of agreement, However, despite repeated requests to plaintiff and Mr. Dhanjibhai Hirpara to return the original agreement and get cancellation of agreement executed, they did not pay any heed and gave evasive replies. It is further contended that upon receipt of notice issued by the plaintiff on 16.10.2015, it came to the notice of defendant that plaintiff had fraudulently got two deeds of agreement to sell executed in his favour, one in respect of suit property and another in respect of Revenue Survey no. 176 paikee 5 of village Mota Devda, Taluka Gondal. It is contended that these properties were never agreed to be sold to the plaintiff as stipulated in the agreements and were to be kept as security for payment of the amount lent by plaintiff, however, the plaintiff played fraud and got agreements to sell executed thereby committing breach of trust. Defendant also contends that plaintiff is not an agriculturist and the execution of agreements to sell as claimed by the plaintiff as well as the terms and conditions of agreements is denied. Defendant also denies about plaintiff having offered the remaining amount of consideration and the entitlement of plaintiff to get the relief prayed in the suit was also denied.

[5] In light of pleadings, Ld. trial Court framed issues at Exhibit-16. The issues framed by Ld. trial Court and findings thereof are as under:

1. *Whether plaintiff proves that defendant has entered into an agreement to sell the bearing registration No.892 dated 15/02/2014 to sell the suit land in consideration of Rs.3,50,000/- to plaintiff and defendant has accepted earnest money of Rs.1,50,000/- from the plaintiff?*
   Held in Affirmative.

2. *Whether the plaintiff proves that even though the plaintiff is ready and willing to pay remaining amount of consideration of Rs.2,00,000/- to the defendant has committed breach of agreement to sell dated 15/02/2015 and failed to execute the sale deed in favour of plaintiff?*
   Held in Affirmative.

3. *Whether defendant proves that he has not entered into an agreement to sell the suit land to plaintiff and not received earnest money as alleged from plaintiff?*
   Held in Negative.

4. *Whether defendant proves that he has borrowed amount from plaintiff and for the purpose of security, plaintiff has got executed suit agreement to sell from defendant which is illegal and not binding to him?*
   Held in Negative.

5. *Whether plaintiff is entitled to get the relief as prayed for?*
   Held in Affirmative.

6. *What order and decree?*
   As per Final Order.

[6] Following oral & documentary evidence are produced by the plaintiff as well as defendant.

A. Oral & Documentary evidences of plaintiff:

No.	Descriptions	Exh.
1.	Oral deposition of Plaintiff	25

2.	Certified copy of registered agreement to sell	42
3.	Legal notice dated 16/10/2015 given by plaintiff to defendant	43
4.	Registered AD of notice	44
5.	Revenue record of suit land; village form no.7/12 ,village form no.8A, village form no.6	46
6.	Closing pursis	49

B. Oral & Documentary evidences of defendant:

No.	Descriptions	Exh.
1.	Oral deposition of defendant	52
2.	Village form no.7/12 of revenue survey no.176	57
3.	Village form no.7/12 of revenue survey no.253	58
4.	Right to further evidence is closed vide order dated 30/08/2022	66

[7] After hearing arguments of either side, Ld. trial Court was pleased to allow the suit, therefore being aggrieved and dissatisfied by the judgment and decree passed by the Ld. Trial Court, present appeal is preferred.

[8] Pursuant to filing of this appeal notice was issued to plaintiff/respondent. Ld. Advocate Mr. R. B. Chavda filed appearance for the plaintiff/ respondent and the matter was taken up for arguments.

Arguments of Appellant/Defendant:

[9] Ld. Advocate for appellant/defendant filed written notes of arguments at Exhibit-10 contending inter alia that the agreement forming subject matter of the suit was executed as security for repayment of the amount of Rs. 1,50,000/- lent by plaintiff to defendant and Mr. Dhanjibhai Hirpara acted as intermediary in the said transaction and the defendant paid interest over the amount lent to him till 16.10.2015 after receipt of notice issued by plaintiff on 16.10.2015 the defendant met Mr. Dhanjibhai Hirpara and as per his advise the defendant went to plaintiff and paid the sum of Rs. 1,50,000/- but as Mr. Dhanjibhai Hirpara was not present the plaintiff sought time for cancellation of agreement and gave assurance that as soon as Mr. Dhanjibhai returns from Surat, cancellation of agreement would be executed, but thereafter the plaintiff with an ulterior motive to grab the lands of defendant, filed the suit underlying this appeal. It is argued that Ld. trial Court has not properly appreciated the material on record and has not considered the averments made in the written statement by the defendant. It is submitted that Ld. trial Court erred grossly in not examining Mr. Dhanjiibhai Hirpara as witness, despite his involvement as intermediary was disclosed. It is argued that Ld. trial Court has not appreciated the fact that suit property was ancestral joint property and the family members of plaintiff also have undivided share in the said property and the defendant individually had no authority to transfer the property to the exclusion of other joint owners, however, Ld. trial Court has ignored the said contention of the defendant.

[10] It is also argued that Ld. trial Court has not considered the submission of defendant side that the value of suit property is much higher than the amount cited as consideration in the agreement and the agreement is sham, fabricated and fraudulent, hence, the Ld. trial Court ought to have dismissed the suit, however, despite such lapses in the case of plaintiff the Ld. trial Court proceeded to allow the suit, hence this appeal may kindly be allowed.

Arguments of Respondent/Plaintiff:

[11] On the other hand, Ld. Advocate for the plaintiff/respondent submits that Ld. trial Court has rightly allowed the suit and present appeal is devoid of merits, hence the same may be dismissed. It is argued that defendant executed registered sale deed in favour of plaintiff and the agreement contains signature of defendant on each page and photograph of defendant as well as his thumb impression were also appended before the Sub-Registrar Gondal. It is argued that the defendant has fabricated the story of amount being lent by plaintiff on interest and the defendant has not been able to adduce any evidence in support the averments made in his written statement. It is submitted that non-examination of Mr. Dhanjibhai Hirpara as witness before the Ld. trial Court cannot be termed as irregularity on the part of plaintiff or the Ld. trial Court, as it was open for the defendant to call upon him as witness; however, the defendant failed to call upon him as witness despite grant of ample opportunities and therefore it is not open for the defendant at this stage that Mr. Dhanjibhai Hirpara ought to have been summoned as a witness. It is urged that considering the fact that Ld. trial Court has properly appreciated the material on record and has rightly decreed the suit, and as this appeal lacks merit; the same may kindly be dismissed:

Points of determination in appeal:

[12] In view of submissions of either side and upon perusal of material on record before the Ld. trial Court, following points of determination arise for just adjudication of this appeal:

> *(a) Whether the plaintiff fraudulently got agreement to sell registered in his favour under the guise of security*

towards the amount lent to defendant on interest?

(b) Whether the suit property was ancestral joint property wherein family members of the defendant have undivided share and defendant alone was not entitled to alienate the same?

(c) Whether the defendant returned the amount lent to him and plaintiff gave assurance the cancellation of agreement would be executed upon return of Mr. Dhanjibhai Devshibhai Hirpara from Surat?

(d) Whether non-examination of Mr. Dhanjibhai Devshibhai Hirpara as witness would vitiate the trial proceedings before the Ld. trial Court?

(e) Whether the judgment and decree of Ld. trial Court warrant any interference by this Court in appeal?

(f) What order?

[13] Findings in respect of above points of determination are as under:

(a) In the negative.

(b) In the negative.

(c) In the negative.

(d) In the negative.

(e) In the negative.

(f) Appeal is dismissed.

Reasons for above findings, in light of submissions of either side and perusal of record, are as under:

[14] At the outset, it needs to be noted that suit is based on registered agreement to sell and the defendant contends that no such agreement was executed by him and that he singed it under a belief that it was for the purpose security in respect of amount lent to him on interest by plaintiff. Before proceeding to appreciate the material on record, it would be apt to refer the decisions of Hon'ble Supreme Court in the case of ***Prem Singh and others V/s. Birbal and others,*** (2006) 5 SCC 353, wherei it was held that there is a presumption that a registered document is validly executed. A registered document, therefore, prima-facie would be valid in law. The onus of proof, thus, would be on a person who seeks to rebut the presumption.

[15] The agreement to sell forming subject matter of the suit is produced at Exhibit-42. It is registered before the office of Sub-Registrar Gondal at Sr. No. 893 of 2014 on 15.02.2014 and it bears complete details of the suit property. The amount of consideration cited in the agreement is Rs.3,50,000/- out of which Rs. 1,50,000/- is mentioned to have been paid in cash to the defendant. The defendant covenants in the agreement that the suit property is free from all encumbrances and that no other person has any right, title, interest or share in the property. It is also evident that no time limit is fixed in the agreement for payment of the remaining amount of consideration and the registered sale deed was to be executed by defendant upon payment of remaining amount of consideration by the plaintiff.

[16] Hon'ble Apex Court in the case of ***Balasaheb Dayanandeo Naik (dead) vs Appasaheb Dattatraya Pawar,*** reported in (2008) 4 SCC 464 laid down that general presumption is that time is not the essence of contract unless contrary intention is expressed in unequivocal language in the agreement itself. Therefore issuance on notice calling upon the defendant to execute sale deed on 16.10.2015 and filing of suit around 6 months thereafter would not operate as an impediment on the part of plaintiff to get the relief of specific performance, it he is otherwise found entitled to.

[17] The defendant contends in written statement as well as in his examination in chief, that upon receipt of notice issued by the plaintiff on 16.10.2015 he came to know about execution of the agreement to sale in favour of plaintiff. The defendant admits in his cross examination that he can read and write and has studied till standard-9, and he can read the name of institutions and offices like banks or Government officer when he visits such institutes. Therefore, it is quite improbable that the defendant would not be aware about the execution of agreement to sell and its content. Besides, there is no recital in the agreement about plaintiff having lent some amount or that in certain event the agreement would stand cancelled. The intention of parties in the agreement is very clear and lucid. The argument that agreement to sell was got executed under the guise of agreement for security of amount lent to defendant, gets washed out completely in light of the fact that defendant admits in his cross examination that agreement to sell the property was executed in favour of plaintiff, which is registered at Sr. No. 893 on 15.02.2014. He also admits of having appended his signature on each page of the agreement at the office of Sub-Registrar and as per the procedure his photograph was also clicked. Hence, there is no room for any doubt that the signatures of the defendant in the agreement are forged or that he had not been to the Sub-Registrar's Office. It would also be apt to note that as per the facts averred by defendant in his written statement, two agreements were executed on 15.02.2015; though it is claimed therein that this fact was disclosed to him after receipt of notice and that these agreements were executed deceitfully.

[18] Had it been a case where plaintiff first came to know about deceitful execution of agreement to sell in favour of plaintiff after receipt of notice on 16.10.2014, as is claimed by defendant in his written statement; it is quite obvious that defendant ought to have sought legal assistance and given a reply to the said notice. It may be relevant to note that suit was filed on 06.04.2016, which is after almost 6 months; however, the defendant surprisingly does not even file a reply or approaches court seeking cancellation of the said agreement to sell. Rather, even after having filed appearance before the Ld. trial Court in suit proceedings, the defendant did not file any counterclaim seeking cancellation of the agreement to sell. Further, in his cross examination upon being asked about receipt of notice issued by plaintiff, the defendant states that he had not accepted the notice and further states that notice might have been sent to his house but it was not received by him and someone from his family might have received it. Nevertheless, since the defendant specifically avers in his written statement that it was only after receipt of the said notice that he came to know about execution of sale deed, coupled with the fact that said notice was sent by RPAD and the postal slip produced at Exhibit-44 established that it was sent on 16.10.2014; hence the defendant cannot dispute that he did not receive any notice. The conduct of defendant in not responding to the said and absence of any counterclaim by defendant creates doubt in the story of defendant that he came to know about execution of the agreement only after receipt of notice.

[19] Defendant denied about receipt of notice, hence was asked as to whether he filed any complaint application before police, to which he states that he has not filed any such application before police, however upon being asked that since no such complaint application is filed by him, he has not produced it before the Court in suit proceedings, to which he states that his advocate has produced it. The photo copy of complaint application is produced by defendant side at Mark 54/5 and in his cross examination the said complaint application was shown to him and he initially states that he does not know where he submitted this complaint and thereafter volunteers to say that he does not know whether it is a complaint or a notice and also states that it was prepared by advocate as per his direction, and that he had read it.

[20] In addition to above, there is lack of consistency in the stand taken by the defendant with regards to the circumstances that lead to execution of agreement as per his case. In his written statement at Exhibit-15 it is stated that he gave copy of village form no. 7-12 abstract of his property to Mr. Dhanjibhai Hirpara to arrange for funds on interest and that he was in need of Rs. 3,00,000/- and he received the said amount, after being called at Gondal with his photograph and identification proof and he contends that he signed the deed that was brought and went back home as he had received the amount. The written statement is silent on the aspect of defendant having appended signature at the office of Sub-Registrar. Whereas in his cross examination he admits of having signed each page of the agreement at the office of Sub-Registrar Gondal and that his photograph was also clicked. The examination in chief of defendant does bear any mention of defendant having received Rs. 3,00,000/- which is contended in his written statement. And defendant also admits about this omission in his cross examination. In the complaint application at Mark-54/5, referred to in cross examination of defendant, it is averred that he was taken to office of Sub-Registrar Gondal by plaintiff and Dhanjibhai Hirpara and a lady advocate inquired about boundaries of his property and he was told to sign the deed hurriedly and that he may read it later and thereafter he was given Rs.2,91,000/- and was told that he would have to pay Rs.

9000/- per month as interest and return the amount within 11 months and if he wants to keep the amount for further period another deed will have to executed. Thus, is lack of consistency in the stand taken by defendant.

[21] Defendant claims to have paid interest regularly and also mentions specific place as Murlidhar Pan Stall on Kothariay Road, Rajkot, where he would pay the amount, however, there is no material adduced on record to indicate that such payment was made by him. Rather, there is absence of clarity as to whether the said amount was being paid by defendant to the plaintiff or Mr. Dhanji Hirpara. In his examination in chief it is mentioned that amount was availed by him on interest at the rate of 2% per month and that interest amount was paid to plaintiff at Murlidhar Pan Stall, Rajkot; however, there is no proof in this regard adduced by the defendant. It is quite strange that as per the say of defendant he had no direct contact with plaintiff and he executes agreement before Sub-Registrar for getting financial aid but opts not to get any receipt or maintain any notes with counter sign from plaintiff in respect of interest paid purportedly paid by him to plaintiff at the rate of 2% per month. Further, if it was the case as claimed by defendant that interest amount was paid regularly at one specific place, the person running the said Murlidhar Pan Stall would be aware about such payments by defendant, but no one has been examined as witness by the defendant. Hence, the story of defendant having taken amount on interest and agreement being executed as security is devoid of any substance.

[22] Further, considering the admissions of defendant in his cross examination with regards to the contents of agreement to sell, coupled with the fact that the agreement to sell is a registered agreement and defendant failed to bring on record any material or circumstances which would suggest substance in his contention; this Court is of the view that Ld. trial Court has rightly resorted to Section 32, 32A and 48 of the Indian Registration Act in arriving at conclusion that defendant had executed the agreement to sell in favour of plaintiff.

[23] The plaintiff has specifically pleaded that he is ready and willing to pay the remainder amount of consideration, being Rs.2,00,000/- but the defendant did not accept such amount and committed breach of agreement. These contentions are also reiterated by plaintiff in his examination in chief at Exhibit-25. It is not even the case of defendant that plaintiff was not ready and willing to pay the remainder amount of consideration or that the plaintiff did not have the capacity to pay the remainder amount at all times after the execution of agreement to sell. Hence, the issue of readiness and willingness on the part of plaintiff does not require to be gone into in further detail.

[24] It is vehemently argued that suit property was a joint family property inherited by defendant and his other family members have undivided share in the property and hence the same cannot be transferred without consent of other co-owners and co-sharers and therefore the agreement cannot be specifically enforced. Such contention is raised in written statement as well as in examination in chief of defendant. However, the defendant has not cited names of co-owners and co-sharers have joint right and undivided share in the property. Rather, apart from word of mouth of defendant that the suit property is not self acquired property and that it is an ancestral property inherited by him, there is no documentary evidence to support such oral contention. The revenue record in the form of village form no.7-12 abstract, produced at Exhibit-58 by the defendant, sole name of defendant is cited as owner and occupier; therefore there is absence of any clear and cogent evidence that the suit property is an ancestral property wherein other heirs are co-owners and co-shares.

[25] Defendant produced photo copy of mutation entry no. 5903 dated 07.01.1991 & mutation entry no. 7974 dated 11.08.2001, but these entries are not exhibited on record as the same were not referred to in deposition of defendant. However, ignoring such lacuna if these entries are considered for the sake of argument, it appears that mutation entry no. 5903 records partition amongst defendant's father and brothers of defendant's father in respect of land bearing survey no. 253, whereas mutation entry no. 7974 records partition amongst defendant and his two brothers and waiver of right by sisters of defendant. Mutation entry no. 7974 also indicate that land bearing Survey no. 253 paike and 176 paikee vested in the share of defendant. Thus, even as per the revenue record apart from defendant there are no other joint owners or co-sharers.

[26] Further, even if the case is examined on the anvil of capacity of defendant to transfer the property on the ground that whether children of defendant would have any right to object or challenge the acts of defendant alienating the suit property or not; it has to be noted that during the life time of defendant, his children would have no rights in the suit property because there is no concept of having co-ownership rights in an immovable property simply because the property is an immovable property belonging to the parental ancestors. It has been clarified by the Supreme Court in the case of **CWT, Kanpur & Ors. Vs. Chander Sen** that after passing of the Hindu Succession Act, 1956 if any person inherits property from his parental ancestors, then, such inheritance is as a self-acquired property and not as an HUF property.

[27] In case titled **Yudhishter Vs. Ashok Kumar** reported in (1987) 1 SCC 204. Hon'ble Supreme Court, in para 10 of the judgment, made observations with respect to when HUF properties can be said to exist before passing of the Hindu Succession Act, 1956 or after passing of the Act in 1956. The said para reads as under:-

"10. This question has been considered by this Court in Commissioner of Wealth Tax, Kanpur and Ors. v. Chander Sen and Ors. MANU/SC/0265/1986 MANU/SC/0265/1986 : [1986]161ITR370(SC) where one of us (Sabyasachi Mukharji, J) observed that under the Hindu Law, the moment a son is born, he gets a share in father's property and become part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source, from the grandfather or from any other source, be it separated property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Section 8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Section 8, he does not take it as Karta of his own undivided family but takes it in his individual capacity. At pages 577 to 578 of the report, this Court dealt with the effect of Section 6 of the Hindu Succession Act, 1956 and the commentary made by Mulla, 15th Edn. pages 924-926 as well as Mayne's on Hindu Law 12th Edition pages 918-919. Shri Banerji relied on the said observations of Mayne on 'Hindu Law', 12th Edn. at pages 918-919. This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12th Edn. page 919. In that view of the matter, it would be difficult to hold that property which developed on a Hindu under Section 8 of the Hindu Succession Act, 1956 would be HUF in his hand vis-a-vis his own sons. If that be the position then the property which developed upon the father of the respondent in the instant case on the demise of his grandfather could not be said to be HUF property. If that is so, then the appellate authority was right in holding that the respondent was a

licensee of his father in respect of the ancestral house."

[28] As per the ratio of the Hon'ble Supreme Court in the case of Yudhishter (supra) after passing of the Hindu Succession Act, 1956 the position which traditionally existed with respect to an automatic right of a person in properties inherited by his paternal predecessors-in-interest from the paternal ancestors of such person upto three degrees above, has come to an end. Under the traditional Hindu Law whenever a male ancestor inherited any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him had a right in that property equal to that of the person who inherited the same. However, after coming into effect of the Hindu Succession Act, 1956, this position stands changed and accordingly if a person after 1956 inherits a property from his paternal ancestors, the said property is not an HUF property in his hands and the property is to be taken as a self-acquired property of the person who inherits the same. The only two exceptions to a property inherited by such a person being self-acquired in his hands, viz. (1) either an HUF and its properties were existing even prior to the passing of the Hindu Succession Act, 1956 and which Hindu Undivided Family continued even after passing of the Hindu Succession Act, 1956. In such case since HUF existed and continued before and after 1956, the property inherited by a member of an HUF even after 1956 would be HUF property in his hands to which his paternal successors-in-interest upto the three degrees would have a right; or (2) if after 1956 a person who owns a self-acquired property throws the self-acquired property into a common hotchpotch whereby such property or properties thrown into a common hotchpotch become Joint Hindu Family properties/HUF properties. In order to claim the properties under the second exception, person so claiming shall have to establish to the satisfaction of the Court as to when (i.e date and year) was a particular property or properties thrown in common hotchpotch and hence HUF/Joint Hindu Family created.

[30] In the case at hand there is lack of such pleading or proof that property was thrown in common hotchpotch or that there exists a HUF/Joint Hindu Family that is vested with the ownerhisp of the suit property. In addition to the above, the defendant while contending that the suit property is an ancestral property of Hindu Undivided Family, also contends that he is Karta of the family, hence in the capacity of karta of the family the defendant would have power to alienate the property. Further, there is no challenge to the agreement of sell executed by defendant in favour of plaintiff by any of the children of defendant till date. Hence, there is lack of credibility in the contention with regards to lack of authority on the part of defendant to execute the agreement in question.

[31] The onus to prove incapacity to execute agreement in respect of the suit property on account of it being a property of HUF was on defendant. But there is lack of elaborate contention or proof by the defendant with regards to details of HUF as referred herein above. Rather, the mutation entry no. 7974 bears recital of the father of defendant having partitioned the properties during his lifetime amongst his children in the year 2001. Resultantly, defendant has miserably failed to discharge the onus of proof that there existed an HUF. Further there is no pleading as to how the properties were inherited by the father of the defendant, therefore, in the absence of any pleading or evidence as to how and when the properties vested in the ownership of father of defendant, it cannot be inferred or held that suit property is a property of HUF.

[32] Therefore, in any case the contention of defendant that the suit property is the property of HUF or a joint family property wherein other family members have joint ownership and share fails. Therefore, it cannot be inferred that the defendant did not have the authority to alienate or transfer the suit property.

[33] On the aspect of inadequate consideration, it may be noted that apart from having contended in written statement that market value of agricultural land at village Mota Davda is in lakhs for one bigha and therefore the market value of suit property would be in crores; there is no evidence adduced by the defendant in support of such contention. In this regard it would be relevant to quote section 20 of the Specifil Relief Act, whic reads as thus:

20. Discretion as to decreeing specific performance.—

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause b).
Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.
(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.
(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

[34] It is thus evident from bare perusal of the above referred provision that mere inadequecy of consideartion shall be deemed to constitute unfair advantage as envisaged in clause (a) of section 20. The amount of consideration fixed in the agreement is Rs. 3,50,000/- and if the defendant wants the Court to believe that the amount of consideration cited in the agreement is inadequate, it was for him to adduce evidence that what would be actual value of the property. Merely stating that it would fetch Crores of rupees would not suffice. The defendant has also not produce any instances of sale of adjoining properties or any other properties of the said village to show that what would be the market value of the property. Hence, since the amount of consideration is specifically mentioned in the agreement to have been fixed by the parties to agreement, it cannot be inferred that the amount is inadequate.

[35] In the case at hand there is lack of such pleading or proof that property was In addition to the above, the defendant while contending that the suit property is an ancestral property of Hindu Undivided Family, also contends that he is Karta of the family, hence in the capacity of karta of the family the defendant would have power to alienate the property. Further, there is no challenge to the agreement of sell executed by defendant in favour of plaintiff by any of the children of defendant till date. Hence, there is lack of credibility in the contention with regards to lack of authority on the part of defendant to execute the agreement in question. Moreover, in order to enable the Court to draw inference of inadequate consideration, it was for the defendant to establish as to what was the market value of the property in question. Without doing so, the Ld. trial Court cannot be found at fault in not believing that the agreed consideration is lower than the market value.

[36] In any view of the matter inadequate consideration by itself would not lead to the conclusion that the same was an agreement of loan. It is trite that, Inadequate consideration is also not a ground for refusing to grant a decree for specific performance of contract.

[37] Whether the agreement was an agreement to sell the suit property or merely a documents to secure financial assistance from the plaintiff depends on several factors and the conduct of the parties. However, in the matter at hand the conduct of defendant not even responding to pre suit notice given by the plaintiff and the fact that even after having participated in suit proceedings the defendant has not filed any counterclaim seeking cancellation of agreement, rules out the probability of the agreement in question having been executed merely to secure financial assistance. It also emerges from perusal of the agreement that there is no stipulation or condition with regards to refund of amount in case of any dispute. There is no forfeiture clause and there is specific clause that all the expenses for registration of sale deed are to be borne by the plaintiff. Hence, there is no mention about any eventuality under which the parties would be exempted from performing their respective part of the agreement and therefore there is lack of substance in the submission of defendant side that the agreement was executed towards security of amount lent by plaintiff.

[38] It is also an argument of defendant side that Ld. trial Court ought to have summoned and examined Dhanjibhai Hirpara as witness. This argument needs to be viewed in light of the fact that onus to establish that the amount received by him from plaintiff was lent on interest and as Mr. Dhanjibhai Hirpara was the intermediary as per the say of defendant, it was rather the duty of defendant to examine Mr. Dhanjibhai Hirpara as witness. Perusal of record indicates that plaintiff filed evidence closure memo at Exhibit-49 on 16.03.2020 and thereafter defendant examined himself at Exhibit-52 and thereafter adjournments were sought time and again, however on 30.08.2022 the Ld. trial Court was pleased to dismiss the application at Exhibit-66 seeking time for production of further evidence by the defendant. It would be relevant to note that in none of the applications seeking time, the defendant mentioned about examining Mr. Dhanjibhai Hirpara as witness. It was never declared by the defendant before the Ld. trial Court that the defendant seeks to examine Mr. Dhanjibhai Hirpara as witness, and therefore considering the nature of proceedings before the Ld. trial Court it cannot be said that Ld. trial Court was duty bound to examine Mr. Dhanjibhai Hirpara as witness. Hence, this

Court does not find any merit in the submission that Ld. trial Court ought to have examined Mr Dhanjibhai Hirpara by summoning him as a witness.

[39] In the matter at hand, the appellant/defendant failed to produce any evidence to show that it will be inequitable to order specific performance of the agreement. It also appears that multiple pleas were raised by the defendant, including the plea that plaintiff is not an agriculturist, however, plaintiff was able to establish that he is an agriculturist. Rather, the most important plea taken by the defendant was that the agreement was fictitious and fabricated and his signatures were obtained by deceit, and the same is also found to be without substance and untenable.

[40] The Hon'ble Supreme Court in 2021 SCC OnLine 365 ***Kadupugotla Varalakshmi v. Vudagiri Venkata Rao***

held that when a defence is raised in the written statement about the non-existence of the agreement, the defence cannot be entertained that the plaintiff is not ready and willing to perform his part of contract. In case titled ***Silvey v. Arun Varghese*** (2008) 11 SCC 45 the Hon'ble Apex Court held that when a false plea has been taken by the defendant about the non execution the agreement then the conduct of the parties would be relevant to exercise the discretion for decreeing the suit for specific performance. Again in case titled ***Narinderjit Singh v. North Star Estate Promoters Ltd*** (2012) 5 SCC 712, the Hon'ble Supreme Court held that when a contract itself was denied the defendant could not have raised the other plea that the plaintiff was not ready and willing to perform his part of contract. In case titled ***A. Kanthamani v. Nasreen Ahmed*** (2017) 4 SCC 654 the Hon'ble Apex Court held that it was not necessary to show that the plaintiff has money in his account to purchase the property.

[41] The Hon'ble Apex Court in case titled ***P. Ramasubbamma Vs. V.Vijayalakshmi and others,*** reported in (2022) 7 SCC 384, held that once the execution of agreement to sale and payment of an advance substantial sale consideration was admitted by the vendor, nothing further was required to be proved by the plaintiff. The relevant observations of Hon'ble Apex Court are reproduced herein below:

'5.2 Considering the fact that original defendant No. 1 – vendor – original owner admitted the execution of agreement to sell dated 12.04.2005 and even admitted the receipt of substantial advance sale consideration, the learned Trial Court decreed the suit for specific performance of agreement to sell dated 12.04.2005. Once the execution of agreement to sell and the payment/receipt of advance substantial sale consideration was admitted by the vendor, thereafter nothing further was required to be proved by the plaintiff – vendee. Therefore, as such the learned Trial Court rightly decreed the suit for specific performance of agreement to sell. The High Court, was not required to go into the aspect of the execution of the agreement to sell and the payment/receipt of substantial advance sale consideration, once the vendor had specifically admitted the execution of the agreement to sell and receipt of the advance sale consideration; thereafter no further evidence and/or proof was required.

... .

5.5 It is also required to be noted that on appreciation of evidence, learned Trial Court has specifically found that the stamp papers of agreement to sell dated 12.04.2005 was purchased in the name of defendant No. 2 and therefore defendant No. 2 was aware and in the knowledge of agreement to sell dated 12.04.2005. It is also required to be noted that even defendants did not reply to the legal notice served by the plaintiff, which was issued before filing the suit.

5.6 In light of the aforesaid factual aspects and the findings recorded *by the learned Trial Court, the decision of this Court in the case of Lala Durga Prasad & Ors. (supra) is required to be referred to. In paragraph 42, it is observed and held as under: "42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin v. Samiraddin [AIR 1931 Cal 67] and appears to be the English practice. See Fry on Specific Performance, 6th Edn., p. 90, para 207; also Potter v. Sanders [67 ER 1057]. We direct accordingly." The aforesaid decision has been subsequently referred to and followed by this Court in the subsequent decision in the case of Rathnavathi & Anr. (supra). 5.7 From the impugned judgment and order passed by the High Court, it appears that the High Court has heavily relied upon Section 34 of the Specific Relief Act. However, considering the fact that specific issues were framed with respect to sale deeds dated 03.05.2010 executed by original defendant No. 2 in favour of defendant Nos. 3 and 4 and the parties led the evidence also on the aforesaid issues and thereafter, when the learned Trial Court had given findings on the said issues and thereafter, had granted the declaration that the sale deeds executed by original defendant No. 2 in favour of defendant Nos. 3 and 4 are not binding on defendant No. 1 and the plaintiff and those sale deeds are nominal sale deeds and that defendant Nos. 2 to 4 have failed to prove that agreement to sell dated 12.04.2005 is a created document and by virtue of the same no consideration has been paid, Section 34 of the Specific Relief Act, upon which the reliance has been placed by the High Court will have no application.*

5.8 The High Court has set aside the judgment and decree passed by the learned Trial Court on the ground that the relief under Section 20 of the Specific Relief Act, is a discretionary relief and therefore, in view of the fact that original defendant No. 2 had executed sale deeds in favour of defendant Nos. 3 and 4, the learned Trial Court ought not to have exercised discretion in favour of the plaintiff for passing the decree for specific performance. However, in the facts and circumstances of the case narrated hereinabove and when the learned Trial Court specifically gave the findings that defendant No. 1 – vendor specifically admitted the execution of agreement to sell dated 12.04.2005 in favour of the plaintiff by accepting a substantial advance consideration and that defendant No. 2 was in the knowledge of the agreement to sell and despite the same, he sold the same in favour of defendant Nos. 3 and 4, who are his sistersinlaw *and that too the sale deeds found to be nominal sale deeds, the learned Trial Court as such rightly decreed the suit for specific performance and also rightly declared that sale deeds dated 03.05.2010 executed by original defendant No. 2 in favour of defendants No. 3 and 4 are not binding upon the plaintiff and defendant No. 1. The High Court has committed a grave error in reversing the judgment and decree passed by the learned Trial Court by ignoring the vital facts of the case which are either admitted or proved in the instant case.'*

[42] In light of the above factual and legal discussion, the Learned Trial Court has rightly allowed the prayer of plaintiff and this Court does not find any good ground to interfere with the view taken by the Learned Trial Court and since this appeal is devoid of merits, the same is required to be dismissed and accordingly, the following final order is passed:

:: O R D E R ::

(a) The present Regular Civil Appeal No. 28 of 2022 is dismissed.

(b) The impugned judgment and decree passed by the Learned Additional Civil Judge, Gondal in Regular Civil Suit No.93 of 2016 on 22.09.2022 is hereby confirmed.

(c) Interim applications pending, if any, stands disposed of accordingly in view of dismissal of this appeal.

(d) Parties to bear their own costs.

(e) Decree be drawn accordingly.

Record and Proceedings be sent back to the Learned trial Court along with a copy of this order and appeal file be consigned to record room.

Signed and pronounced in open court, today on this
30th DAY OF OCTOBER, 2023 AT GONDAL.

Date: 30/10/2023
Place: Gondal

(M. A. BHATTI)
3rd Additional District Judge, Rajkot, at
G O N D A L
Code No. GJ01506

 # K.H.PANDYA