HIGH COURT OF GUJARAT

HAMIRBHAI BHIMSHIBHAI NANDANIYA
Versus
MANSUKHBHAI KARAMSHIBHAI SANGHANI

Date of Decision: 30 June 2022

Citation: 2022 LawSuit(Guj) 5615

Hon'ble Judges: Dr A P Thaker

Case Type: Appeal From Order; Civil Application (For Stay)

Case No: 112 of 2022; 1 of 2022

Subject: Civil

Acts Referred:
Code Of Civil Procedure, 1908 Sec 104, Or 43R 1(r)

Final Decision: Appeal allowed

Advocates: Nanavati Associates, Premal S Rachh

Cases Referred in (+): 9

Dr. A. P. Thaker, J.

[1] The present Appeal From Order has been preferred by the original plaintiff under Section 104 read with Order 43 Rule 1(r) of the Code of Civil Procedure against the order dated 27.05.2022 passed by the learned 4th Additional Senior Civil Judge, Jamnagar below exhibit 5 in Special Civil Suit No.19 of 2021, whereby the Trial Court has rejected the application for interim injunction filed by the appellant, the original plaintiff has preferred this Appeal From Order.

[2] The appellant is original plaintiff whereas the respondents are original defendants before the Trial Court. For the brevity and convenience, the parties are referred to in this order as per the character assigned to them before the Trial Court i.e. plaintiff and defendant.

[3] The brief facts giving rise to the present suit by the plaintiff for specific performance of contract and permanent injunction are as under:

3.1. That the land situated in Village Vibhapar of Jamnagar District, bearing Revenue Survey no.2 paiki admeasuring hectares RA 0-44-52, which is known as 'Pandardu' and land of Revenue Survey No.12/1 paiki 1 admeasuring hectares RA squaremeters 2-37-74 known as 'Limdavadu' are the suit land for which there was an agreement to sale executed between the parties on 17.06.2015 for an amount of Rs.85,00,000/- per vigha in all Rs.14,82,18,750/-. That at the time of executing the agreement to sale, an amount of Rs.56,35,700/- was paid by the plaintiff as an earnest money to the defendants. Thereafter, time and again on various dates through cash and cheque various amount were paid by the plaintiff to the defendants, which came to be acknowledged by the defendants on the original copy of agreement to sale dated 17.06.2015 itself. The defendants have acknowledged receipt of Rs.8,40,10,700/-.

3.2. As per the terms of agreement to sale, the stipulation for payment was to the effect that 20% of the total consideration was to be paid before 17.03.2016, whereas 55% of the consideration was to be paid within 5 years from the date when the land is converted for agriculture purposes and the remaining amount of 25% was to be paid in terms of the effect that another land of the plaintiff be given to the defendants.

3.3. Further, under the said agreement to sale, it was agreed that remaining 25% of the consideration was to be paid in form of property at the market rate and the defendant had to execute the sale deed in favour of the plaintiff. That the land was to be converted into non agricultural use by the plaintiff and upon receipt of the 25% consideration, possession of the land was to be handed over by the defendant to the plaintiff, which was duly handed over to the plaintiff.

3.4. According to the plaintiff, it got the land converted into non agriculture purpose and 25% of the consideration was paid to the defendant and the defendant has handed over the possession to the plaintiff thereof.

3.5. That there was certain dispute with regard to the right of way with the adjoining land owner which was required to be resolved by the defendants and the defendants were bound to provide the right of way. That the understanding was reached between the defendants and the neighbour with regard to the right of way on 19.05.2016, as per the documents produced at mark 3/4 in the suit. That the defendants were bound to carry out measurement of the land and verification was to be done by the parties and if any deficit in the area is found, then, it was to be deducted in calculating the consideration. It is alleged by the plaintiff that the original agreement dated 17.06.2015 was with the defendant and the plaintiff was having xerox copy only.

3.6. According to the plaintiff, when the neighbours were in the process of converting their portion of land into non agriculture land, the defendants had submitted their objection dated 26.10.2016 to the Jamnagar Mahanagarpalika stating and admitting that the plaintiff herein has vested right over the property and also averred that the plaintiff has spent huge money for the development of the suit property. According to the plaintiff, this version of the defendant clearly suggests that the plaintiff was in possession of the property. It is also contended that as original copy of the agreement to sale was misplaced by the parties and therefore on the safer side, the parties agreed to execute another agreement to sale dated 18.11.2017. In the second agreement to sale, the defendants have acknowledged that they have already received an amount of Rs.8,40,10,700/-. That the plaintiff in addition to the above consideration paid further consideration of Rs.2,14,34,000/- in cash and Rs.2,70,30,500/- by cheque to the defendants. According to the plaintiff, the remaining consideration to be paid is of just of Rs.1,57,43,550/- and area to the tune of 491.77 squaremeters was to be deducted as per the Town Planning Scheme for which consideration of Rs.25,82,275/- was required to be deducted.

3.7. Further it is contended that after the conversion of the land for non agriculture purposes, lay out plan of the suit land was sanctioned by the Competent Authority, Corporation for 198 residential plots. It is also contended that defendant has issued notice informing the cancellation of the agreement to sale dated 17.06.2015, however in that notice, there was no averment regarding the subsequent registered agreement to sale as well as the subsequent agreement. That this action on the part of the defendant is in a nature of refusal to execute the sale deed in pursuance of the agreement to sale between the parties and therefore the plaintiff filed aforesaid suit. According to the plaintiff, it is bounden duty of the defendant to perform his part of the agreement to receive remaining amount and to execute sale deed in favour of the plaintiff. On all these facts, the suit for specific performance of the contract along with the injunction was filed by the plaintiff and with the suit, interim injunction application was filed by the plaintiff.

[4] The defendant has resisted the suit by filing reply and has denied the factum of handing over of the possession to the plaintiff and also contended that there is no cause of action for the plaintiff to file the suit and all the three ingredients of granting interim injunction is not in favour of the plaintiff and defendant has sought for dismissed of the interim injunction application.

[5] Heard learned senior counsel Ms.Manisha Lavkumar Shah with Aditya Dave for the Nanavati Associates for the plaintiff and learned advocate Mr.Premal Rachh for the

defendant at length. Perused the material placed on record and the decisions cited at bar.

[6] Learned senior counsel Ms.Manisha Lavkumar Shah has, while referring to the agreement to sale as well as subsequent documents, vehemently submitted that there is no dispute regarding the execution of agreement to sale between the parties. She has also submitted that as per the agreement to sale consideration amount was to be paid in installment and accordingly, the plaintiff has paid the same to the defendant. She has also submitted that as per the agreement to sale dated 17.06.2015, initially Rs.56,35,700/- was paid and thereafter, Rs.8,40,00,000/- was paid in cash which was acknowledged by the defendants by putting their signatures in below the agreement to sale. She has also submitted that thereafter, Rs.76,95,000/- was paid by cheque and thus in all Rs.9,17,05,700/- was paid to the defendants by the plaintiff. She has submitted that since the original agreement to sale came to be misplaced by the parties, the parties entered into 2nd unregistered agreement dated 18.11.2017, whereby the defendant has accepted the receipt of Rs.8,40,00,000/- as per clause 3 of the said agreement to sale produced at mark 3/2 in the trial Court which is at page no.14 of the paper book.

6.1. Learned senior counsel Ms.Shah has also contended that as per the conditions of the agreement to sale, the plaintiff had to get the land converted in to NA and accordingly it has got it converted into NA and 198 plots were drawn thereof. She has also submitted that thereafter the 3rd agreement came to be executed between the parties on 29.12.2018. She has also submitted that the defendant has already handed over the possession to the plaintiff whereupon the plaintiff has got the land converted in to NA and has also got sanctioned from the Corporation for erection of the residential premises for the 198 plots.

6.2. Learned senior counsel Ms.Shah has also submitted that there was some dispute regarding the right of way with the neighbours of the adjoining land and therefore there was triparte agreement entered into on 19.05.2016 which is at mark 3/4 (page 38 of the paper book) wherein, it is specifically averred that the plaintiff has purchased the said land. She has also referred to the objection raised by the defendant before the Jamnagar Mahanagar Palika for converting the land into NA filed by the neighbours which is at mark 3/14 and has submitted in the said objection, the defendant has admitted that the plaintiff has spent huge amount on the suit property and has right over the same. According to her submissions, thus the defendant has clearly admitted the factum of purchase of the land by the plaintiff from him and execution of the agreement to sale and however on 06.10.2021 for the first time issued notice revoking only the agreement dated 17.06.2015, however, in the said notice, there was no mention of any undue

influence nor there is any mention regarding the subsequent agreement to sale or registered agreement entered into between the parties. She has submitted that this notice came to be replied by the plaintiff and thereafter defendant gave public notice in the news paper. She has submitted that from the documentary evidence produced in the matter, it clearly reflects that there is no dispute regarding the execution of agreement to sale between the parties as the defendant tried to back out his promise to perform his part of the contract, the plaintiff had to file a suit for specific performance and also for injunction.

6.3. Learned senior counsel Ms.Shah has also submitted that the trial Court has not appreciated all these facts and has committed error of facts and law in observing that the plaintiff is not in possession and the Court Commissioners Report cannot be looked into at the interim stage. She has submitted that the trial Court ought to have appreciated that the defendant has received more than Rs.13,00,00,000/- from the plaintiff and NA permission was got by the plaintiff and the plaintiff was also in possession of the land and has also obtained requisite permission for erecting residential premises on 198 plots. She has submitted that when there was no denial on the part of the defendant regarding the execution of agreement to sale and registered document and acceptance of amount, the trial Court ought to have granted injunction against the defendant otherwise, there would be multiplicity of proceedings. She has submitted that the impugned order of the trial Court is not sustainable in the eyes of law and it is perverse one and therefore it needs to be interfered with by this Court. She has prayed to allow this Appeal From Order. She has relied upon the following decisions in support of her submission.

[7] Learned senior counsel Ms.Shah has relied upon the judgment of the Apex Court in case of Ashwinkumar K. Patel V. Upendra J. Patel, 1999 3 SCC 161, wherein in para 11 it has been observed as under:-

"11. The case of the owners further was that the agreement dated 16.7.1991 set up by defendants 15 to 19 was not true and valid and that the power of attorney dated 16.7.1991 in favour of defendants 15 and 28 stood revoked so far as the 11th defendant was concerned, as the 11th defendant died on 25.2.1994. The trial Court also held that the power of attorney was prima facie not an irrevocable one. It also held that the agreement entered into by the owners in favour of the plaintiff on 14.10.1980 and 6.4.1996 and also the agreement by the power of attorney agents defendants 15 and 18 dated 16.7.1991 in favour of defendants 15 to 19 was invalid for breach of the provisions of the Tenancy Act. The Court Commissioner in the special suit 293 of 1996 filed by the plaintiff earlier on 25.2.1996 got a panchnama done and had stated that, on physical verification, the plaintiff was found to be in possession (vide para 45 of the judgment of the trial

Court). The trial Court also observed that the mere fact that the defendants 15 to 19 and 28 produced some bills, receipts, cash memos - xerox copies as evidence of purchase of construction material did not establish the possession of the said defendants 15 to 19. It held that the original owners' possession as per the compromise dated 26.4.80 in Suit No.1384 of 1988 between defendants 1 to 14 and defendants 20 to 25, must be treated as subsisting inspite of the agreement between the owners and the defendants 15 to 19 dated 16.7.1991 and inspite of the possession receipt in favour of defendants 15 and 28. There is some force in the contention of the appellant before us that even if the Compromise in Suit 1384/88 dated 26.4.1990 was recorded on 14.8.92, the defendants 20 to 25, who accepted plaintiff's possession on 26.4.90 would not have failed to bring it to the notice of the Court on 14.8.1992 when the compromise was recorded, if the plaintiff was not in possession. The High Court did not even refer to the case of the plaintiff regarding the agreement dated 14.10.1980 said to have been executed by the defendants 1 to 14 in favour of the plaintiff initially and the various payments upto Rs.5,75 lakhs made thereunder, and to Rs. 1 lakh paid under the modified agreement dated 6.4.1996. In their written statement, the owners supported the plaintiff's possession even as on date of suit. The FIR filed by the plaintiff is also some evidence of a claim to possession of plaintiff and the attempt of defendants 15 to 19 to dispossess the plaintiff. Above all, the finding of the Court Commissioner in special suit No.293 of 1996 that plaintiff was in possession is of considerable importance. Further, several of defendants 1 to 14 filed affidavits in the trial Court stating that they have not entered into any agreement with defendants 15 to 19 and that they did not receive any cheques from defendants 15 to 19 and from defendants 20 to 27 and that plaintiff was in possession."

7.1. Learned learned counsel Ms.Shah has relied upon the judgment of the Apex Court in case of **Dana Ram & Ors V. The Civil Judge (J.D.) & Ors,2004 SCCOnLineRaj 51** , wherein in para 12 it has been observed as under:-

"12. In my opinion, the Court can direct status quo to be maintained in respect of disputed property and further can appoint a Commissioner to visit the site and to report with regard to actual use of the property and if the report is submitted by the Commissioner, that report should be taken into account at the stage of granting temporary injunction and if that report isprepared in presence of both the parties, its importance becomes more and even in a case where the Commissioner visits the site in defendants absence and even without giving any notice to them, that report can be looked into if the Court feels that the said report gives picture of the site in correct manner. Thus, the report of the Commissioner forms acceptable basis for passing ad interim injunction or direction though such report is not an

absolute evidence at that stage and has to be scrutinised with greater care and effectiveness at the stage of trial."

7.2. Learned senior advocate Ms.Shah has relied upon the judgment of this Court in case of **Gitaben Govindbhai Patel V. Rameshbhai Hirabhai Patel** reported in Appeal From Order No.35 of 2021 in order dated 15.03.2022 in para 13, has observed as under:-

"13.Now, it is well settled principle of law that so far as the suit based on agreement to sell for specific performance of contract, even if that agreement to sell is not registered, same can be considered for collateral purpose. Such agreement to sell can be considered for the purpose of Section 53A of the Transfer of Property Act. Even an unregistered document can be used as evidence for collateral purpose. If there is contract of agreement to sell and the same is not refused by the defendant and further when legal notice has been issued to the defendant for purpose of that contract, if no injunction is granted in favour of the plaintiff, then, there might be multiplicity of litigation in case defendant transfers the property during the pendency of the litigation. Since the right of property is involved in respect of agreement to sell, it is necessary that nature of the property does not change hand or does not change its status during the pendency of the suit."

7.3. Learned senior advocate Ms.Shah has relied upon the judgment of the Apex Court in case of Maharwal Khewaji Trust (Regd.), Faridkot V. Baldev Dass, 2004 8 SCC 488 , wherein in para 10 it has been observed as under:-

"10.Be that as it may, Mr. Sachhar is right in contending that unless and untill a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case no such case of irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to put the scheduled property to better use. We do not think in the facts and circumstances of this case, the lower appellate court and the High Court were justified in permitting the respondent to change the nature of property by putting up construction as also by permitting the alienation of the property, whatever may be the condition on which the same is done. In the event of the appellant's claim being found baseless ultimately, it is always open to the respondent to claim damages or, in an appropriate case, the court may itself award damages for the loss suffered, if any, in this regard. Since

the facts of this case do not make out any extraordinary ground for permitting the respondent to put up construction and alienate the same, we think both the courts below, namely, the lower appellate court and the High Court erred in making the impugned orders. The said orders are set aside and the order of the trial court is restored."

7.4. Learned senior advocate Ms.Shah has relied upon the judgment of the Apex Court in case of Adani Exports Ltd. V. Hindustan Organic Chemicals Ltd., 2000 3 GLR 2759, wherein in para 48 it has been observed as under:-

"48. It is also well settled principle of law that in order to make out a prima fade case, necessary for granting an interlocutory injunction, the plaintiff need not establish his title. It is enough if he can show that he has a fair question to raise as to the existence of right which ho alleged and can satisfy the Court that the property in dispute should be preserved in its present actual condition until such question is disposed of. The Court must also, before disturbing any man's legal right stripping him off any of the rights with which law has clothed him, be satisfied that the probability is in favour of his case ultimately failing in the final issue of a suit."

7.5. Learned senior advocate Ms.Shah has relied upon the judgment of the Apex Court in case of Milind S/o. Madhusudan Alsundekar Vs. Ajay S/o. Prabhakar Rawat, 2016 2 MhLJ 656 , wherein in para 3 it has been observed as under:-

"3. It appears that the substantial amount in the sum of Rs.10.00 Lacs has been paid out of agreed consideration of Rs.19.00 Lacs as per agreement whereby the defendant was called upon to perform part of the contract and execute the sale deed upon payment of entire consideration amount. The plaintiff has apprehension that the defendant is likely to create third party interest so as to defeat the claim of the plaintiff in the pending suit. This apprehension of likelihood of creating thirty party interest itself sufficient in the accompanying facts and circumstances that there was an agreement to sell suit property existing which averred that consideration is in the sum of Rs.19.00 Lacs and substantial amount of Rs.10.00 Lacs was already paid. When such averments are made before the trial Court, the trial Court should have protected the property from changing its hands by the defendant pending disposal of the suit. The defendant could have been restrained from creating third party interest till trial Court decides the suit on merits. That being so, the impugned order needs modification."

7.6. Learned senior advocate Ms.Shah has relied upon the judgment of the Apex Court in case of R.N.Bakshi and Anr. Vs. Varun Kumar Datt, 2000 55 DRJ 815,

wherein in para 10 and 11 it has been observed as under:-

"10. The balance of convenience is also in favour of the plaintiffs. They are in possession of the property. They have paid a sum of Rs. 3,30,000/- against the sale consideration of Rs. 20 lakhs. Since payments over and above the advance of Rs. 100,000/- have been paid, it would be reasonable to say that the contract had advanced beyond the initial stage to where partial performance had already taken place." While it is open to a party to forfeit the earnest money, I can not find any justification to forfeit part-payment of the sale consideration. It could be argued that when the engagement proceeds beyond the stage of earnest money, the appropriate remedy would be in the nature of an action of the recovery of the balance sale consideration.

11. Since immovable property is in question, it must be presumed that a breach of an agreement relating thereto would have the consequence of the party complaining of the breach suffering irreparable injury."

7.7. Learned senior advocate Ms.Shah has relied upon the judgment of the Apex Court in case of Gopal Dwarkaprasad Gupta Vs. Prashant P. Kothekar, 2015 3 MhLJ 640 , wherein in para 17 it has been observed as under:-

"17. In view of the above discussion, I find that this is a case wherein the appellants have established existence of prima facie case in their favour, Substantial amount of sale consideration has prima facie been paid by the appellants to the respondent. Therefore, balance of convenience would tilt in their favour. The property in question is an immovable property which prima facie appears to have non-agricultural potentiality. Therefore, if injunction is refused, there is a possibility of causing of irreparable loss to the appellants, also arising of complications in the matter. Accordingly, I find that the order impugned herein cannot be sustained in law and it deserves to be quashed and set aside."

[8] Per contra learned advocate Mr.Premal Rachh for the respondent has vehemently submitted that the plaintiff has rested his claims upon three agreements, however, his pleading is not in consonance with all these agreements. Learned advcoate Mr.Rachh, while referring to the last registered agreement, has submitted that there is no mention of earlier agreements in this last agreement and therefore the version of the plaintiff as to execution of earlier agreement cannot be believed. Learned advocate Mr.Rachh has also submitted that the first agreement is executed in individual capacity and there is only reference as to payment by cash and there is no reference as to payment of consideration by any cheque. He has also submitted that the conditions incorporated in the first agreement has not been fulfilled by the plaintiff. He has also

submitted that the Clause 4 and 5 of the first agreement does not find place in the subsequent document. He has also submitted that so far as the triparte agreement is concerned, it was the duty of the plaintiff to construct road.

8.1. Learned advocate Mr.Rachh has also submitted that the second agreement is of 18.11.2017, wherein it is shown that it is an old tenure land and there is no whisper as to execution of earlier agreement to sale between the parties. He has also submitted that when the second agreement alleged to have been executed, NA order was already passed. He has also submitted that there is no whisper as to why second agreement came to be executed between the parties. While referring to the suit agreement, he has submitted that even in this agreement there is no reference as to earlier two agreements. He has raised the doubt that if really there was an agreement to sale entered into between the parties, then such agreement to sale could not be in a possession of the seller but it might be with the purchaser. However, in the present case, it is say of the plaintiff that the said agreement to sale was in the possession of the defendant. He has submitted that this creates doubt as to the execution of the agreement between the parties. He has also submitted that at no point of time possession was handed over by the defendant to the plaintiff and the version in the Court Commissioner Panchnama regarding having sign board of the plaintiff does not mean that plaintiff was and is in possession of the land in question. He has submitted that it is well settled that when the property in open land then it is deemed to be in the possession of the original owner. He has submitted that in the present case, there is no iota of any evidence regarding the possession being handed over to the plaintiff by the defendant. He has submitted that the trial Court has properly appreciated the facts and has properly rejected the injunction application filed by the plaintiff.

8.2. Learned advocate Mr.Rachh has also submitted that there is no evidence regarding payment of cash amount to the defendant and how this much amount was available with the plaintiff is not proved with any documentary evidence. He has also submitted that there is a dispute as to cash payment and there is no continuity of agreements. He has submitted that in absence of any evidence as to the payment of cash amount to the defendant and in absence of documentary evidence of having such huge cash with the plaintiff, the question of payment of consideration cannot be believed. For this submission, he has relied upon the observations of this Court made in the case of **Jayeshkumar Mathurbhai Patel Vs. Mukeshbhai Vershibhai Desai** in Appeal From Order No.130 of 2020 in order dated 27.04.2022, in para 28, 29 and 39:-

"28. In case of Harshadkumar Kantilal Bhalodwala v. Ishwarbhai Chandubhai Patel (Supra), paras 6 and 7 read as under:

"6. Heard the learned Advocates appearing on behalf of the respective parties at length. At the outset, it is required to be noted that the respondent No. 1-original plaintiff has instituted the suit for cancellation of registered sale-deed dated 15-5-2007 executed by the original defendant Nos. 1 and 2 (original owners) in favour of the original defendant Nos. 3 and 4 (appellants herein). He has also filed suit for specific performance of the agreement to sell dated 16-1-2006 (20-1-2006) alleged to have been executed by the original defendant Nos. 1 and 2. It is the contention on behalf of the appellants that he has paid Rs. 4,50,000/- by way of part sale consideration to the defendant Nos. 1 and 2 at the time of execution of alleged agreement to sell dated 16-1-2006. It is to be noted that the original defendant Nos. 1 and 2 have specifically disputed the execution of the agreement to sell dated 16-1-2006 as well as receipt of Rs. 4,50,000/- alleged to have been paid by cash. Therefore, once the execution of the agreement to sell is disputed and even the receipt of the part sale consideration which is alleged to have been paid by cash is disputed, in that case, initial burden to prima facie prove such payment which is alleged to have been paid by cash is upon the plaintiff who asserts that the said amount is paid by him. As held by the learned Single Judge in the case of Khimjibhai Harjivanbhai Patadia (supra) when the factum of payment of part sale consideration which has been alleged to have been paid by cash is seriously disputed in that case, the plaintiff is required to produce some evidence to show that whether he has withdrawn the said amount from any Bank account or he has borrowed from any one. In the present case, the plaintiff has not produced anything to show that while making the payment of Rs. 4,50,000/- as alleged, he has withdrawn the said amount from any Bank account or he has borrowed the money from any one. Learned Advocate for the original plaintiff is not in a position to point out any corresponding documentary evidence in the form of income tax return or the Bank passbook etc. Therefore, the original plaintiffs has prima facie failed to prove and/or establish the payment of Rs. 4,50,000/- by way of part sale consideration.

7. On considering the impugned order passed by the learned trial Court allowing application Exh. 5, it appears that solely relying upon the alleged agreement to sell dated 16-1-2006/20-1- 2006, which is specifically disputed by the executant, learned Judge has held that there is a prima facie case in favour of the plaintiffs, and accordingly, observed that the balance of convenience as well as irreparable loss would be in favour of the original plaintiffs. It is to be noted that original defendant Nos. 3 and 4 have purchased the property by registered sale-deed after the original land-owners gave public notice in the local newspaper intending to sell the land in question and when no objections were submitted by anybody inclusive of the plaintiffs, the original defendant Nos. 3 and 4 have purchased the property

on payment of full sale consideration. Under the circumstances, it can be said that the original defendant Nos. 3 and 4 are the bona fide purchasers of the land in question on payment of full sale consideration. In view of such a situation, the balance of convenience can be said to be in favour of bona fide purchaser i.e. defendant Nos. 3 and 4. Nothing is on record that original plaintiffs had submitted any objection pursuant to the public notice/advertisement in the local newspaper given by the original land-owners intending to sell the land in question. Under the circumstances, the learned trial Court has materially erred in holding the prima facie case as well as the balance of convenience in favour of the original plaintiffs. As such on considering the entire order passed by the learned trial Court, the learned Judge has not assigned any reason how the balance of convenience would be in favour of the original plaintiffs. As stated above, solely relying upon the alleged agreement to sell dated 16-1-2006 (20-1-2006), which has been seriously disputed, the learned Judge has observed that there is a prima facie case and balance of convenience in favour of the plaintiffs. It cannot be disputed that while considering the application for injunction under Order 39, Rules 1 and 2 Code of Civil Procedure, Court is required to consider the three aspects i.e. (i) prima facie case, (ii) balance of convenience (iii) irreparable loss in terms money if the injunction as prayed for is not granted. While granting the injunction all the three aforesaid conditions are to be satisfied. Even if there is prima facie case in favour of the plaintiffs but the balance of convenience is not in favour of plaintiffs and/or if it is found that the plaintiff can be compensated in terms of money even if the injunction is not granted, the Court may not grant even interim injunction. In the present case, the learned Judge has not considered the aforesaid aspects more particularly, with respect to balance of convenience and the irreparable loss in terms of money if the interim injunction as prayed is not granted"

29. In the case of Ramnikbhai Vajubhai Kyada v. Bhupatbhai Labjibhai Thumar (Supra), it is held in paras-8 and 9 as under:

"8. In the case on hand, the execution of the agreement to sell is disputed and even the receipt of part sale consideration which is alleged to have been paid by cash is also disputed. In that case, initially, burden to prima facie prove such payment, which is alleged to have been made by cash, is upon the appellant, who asserts that the said payment is made by him. When the factum of payment of part sale consideration, which has been alleged to have been made by cash is seriously disputed in the case, the appellant is required to produce reliable and cogent evidence to show whether he has withdrawn the said amount from any bank account or he has borrowed from anyone. In the present case, the appellant has not produced anything to show that while making the payment of Rs.5 lac, as

alleged, he has withdrawn the said amount from any bank account or borrowed from anyone. Learned advocate for the appellant is not in a position to point out any corresponding documentary evidence in form of IT return or bank passbook or any other pieces of evidence. Therefore, the Court has no hesitation to say that the appellant has prima facie failed to prove and/or establish the payment of Rs.5 lac by way of part sale consideration.

9. Considering the impugned order passed by the learned trial Judge, it appears that both the estate brokers have denied the execution of so called agreement dated 9.2.2011 in their presence and also denied the payment of part consideration by the appellant to the respondent Nos.1 and 2 in their presence. So, in Court's considered opinion, the appellant has failed to prove his prima facie case. If any injunction pending hearing of the suit is granted, then the respondent Nos.1 and 2 would be put into irreparable loss and therefore, the learned trial Judge has rightly dismissed the injunction application."

39. It is also pertinent to note that in the present case, as per the say of the plaintiff, they have paid Rs. 84 lakh to the defendant No.1 by cash transaction, however, except the copy of books of account, no other material of payment of Rs. 84 Lakh in cash is produced. Whereas, it reveals from the registered sale deed executed in favour of defendant No.5, that amount has been paid by cheques. Thus, the very factum of payment of consideration by the plaintiffs to defendant No.1 is shrouded with cloud. Of course, defendant No.1 has not appeared and has not denied the receipt of Rs. 84 Lakh. But, fact remains that there is no prima-facie documentary evidence to support the version of payment of cash amount to defendant No.1. Even if the say of the plaintiffs- appellants regarding the payment of Rs. 84 lakh is accepted, in that case also, considering the fact that defendant No.1 himself has no legal title over the property, any document executed by him in favour of plaintiff, primafacie does not give any title to the plaintiffs-appellants over the property."

8.3. Learned advocate Mr.Rachh has also relied upon the observations of this Court made in the case of **Jigarbhai Pankajbhai Shah Vs. Natwarsinh Ganpatsinh Parmar** in Appeal From Order No.175 of 2021 in order dated **09.06.2022**, in para 9 and 10:-

"9. Having considered submissions made on behalf of both the sides coupled with the material placed on record and the various pronouncement which are referred to hereinabove, it emerges from the record that there is no dispute as to the facts that defendant Nos. 1 to 7 had agreed to sell the Suit land to the plaintiff on certain conditions as per the agreement to sell dated 22.8.2017 for consideration of Rs.

11.30 Crore. There is also various conditions incorporated in the said agreement to sell, which includes the title clearance and mutation of the names of the heirs of the deceased Dilipsinh. It reveals from the record that the plaintiff has given notice for title clearance in the Newspaper on 8.11.2017. Against the notice, defendant Nos. 1 to 3 and 9 and 17 have raised objection on 14.11.2017. It reveals from the said objections that respective defendants have clearly contended that the suit land is an ancestral property and they have heir-ship right in the property and, therefore, since the transaction was entered into without their consent, no title clearance certificate be issued. It also reveals that as per objection, the specific averment has been made by the signatory to the agreement to sell that the plaintiff has not fulfilled his part of the agreement to sell and, therefore, the sellers are not ready to execute the same and informed the advocate of the plaintiff to take back the amount of consideration paid by the plaintiff and to issue receipt thereof.

10. It also reveals from the record that after receipt of the said objection in November, 2017, the plaintiff has issued legal notice on 4.4.2018 to defendants for withdrawal of the objections raised by them against the public notice and get title clearance certificate and to execute the sale deed in favour of the plaintiff, as per the agreement to sell entered into between the parties within 15 days thereof. It appears that this notice has not been replied by the concerned defendants. It also reveals from the record that defendant Nos. 1 to 7 have got entered the names of defendant Nos. 8 to 18 in revenue record vide entry No. 7124 dated 12.4.2018. It also reveals from the record that on 5.7.2018, defendant Nos. 1 to 18 have executed sale deed in favour of defendant Nos. 19 and 20 for sale consideration of Rs. 7.50 Crore. It reveals that such transaction was made without any public notice, without any title clearance certificate. However, the fact remains that from the date of raising of the objections i.e. 14.11.2017, till issuance of legal notice i.e. 4.4.2018, no action was taken by the plaintiff in respect of the alleged agreement to sell, especially when the concerned defendants have clearly denied to execute the sale deed and directed the plaintiff to get refund of consideration paid by him. It also appears that after issuance of notice on 4.4.2018 wherein time limited to execute sale deed and to withdraw the objection against title clearance within 15 days was fixed, no action was initiated by the plaintiff till the date of filing of the suit i.e. on 7.9.2018. Thus, when the sale deed was executed on 5.7.2018, the plaintiff has not approached the Court immediately but has waited for two months. The explanation given by the plaintiff for not taking any action in between the raising of objections by the defendants against the title clearance and issuance of legal notice, that there was oral conversion between the parties is concerned, is not plausible one. More so, when 15 days time after issuance of the legal notice dated 4.4.2018 was already expired and the original owner of the property have not

complied with the notice within the stipulated period of 15 days, the plaintiff has waited for 5 months even thereafter. Not only that even after sale transaction, between defendant Nos. 1 to 8 in favour of defendant Nos. 19 and 20 in July, 2018, the plaintiff has filed the Suit in September, 2018 for equitable relief."

8.4. Learned advocate Mr.Rachh has submitted that being an Appellate Court, this Court has limited jurisdiction to interfere with the discretionary order passed by the trial Court in an application pertaining to interim injunction under Order 39 Rule 1 and 2 of the Code of Civil Procedure. He has submitted that even if the second view of the matter is possible, being an Appellate Court, this Court has limited jurisdiction to interfere with such order of the learned trial Court. He has submitted that if the order of the trial Court is plausible one then merely because second view of the matter is possible is not a ground for the Appellate Court to interfere with the discretionary order passed by the trial Court in such application. He has submitted that in the present case, the impugned order of the trial Court is plausible one and therefore this Court may not interfere with the discretionary order passed by the trial Court. He has prayed to dismiss the present Appeal From Order.

[9] In rejoinder, learned senior counsel Ms.Shah has vehemently submitted that the conduct of the defendant needs to be looked into while deciding the matter. She has submitted that the defendant has not cancelled the second agreement nor the registered document. She has submitted that the defendant has already received consideration of more than Rs.14,00,00,000/-. She has also submitted that the acceptance of cash amount is specifically accepted by the defendants by their own writing in the agreement to sale. She has submitted that the observation of this Court in Appeal From Order No.130 of 2020 was in a peculiar facts of that case wherein no documentary evidence was produced, whereas in the present case, the defendants themselves have accepted the factum of receipts of cash amount by putting their own signature in token thereof in the agreement to sale. She has also submitted that even in the present case, necessary documentary evidence from certified copy of the chartered account has already been produced. She has submitted that in the present case, considering the material placed on record, the trial Court has clearly committed error of law in rejecting the application of the plaintiff and the impugned order of the trial Court being perverse one, this Court has jurisdiction to interfere with such order and therefore this Appeal From Order may be allowed.

[10] Having considered the submissions made on behalf of both the sides coupled with the material placed on record and the decisions cited at bar, the moot question is as to whether the impugned order of the trial Court rejecting the interim injunction application of the plaintiff is sustainable in the eyes of law or not.

[11] Now it is well settled principle of law that in an appeal against the exercise of 'discretion' by the Court of first instance, the power of Appellate Court to interfere with the exercise of discretion is restrictive. Merely, because, on facts, the appellate Court would have concluded differently from that of the Court below, that would not, by itself, provide justification for Appellate Court to interfere. To justify interference, the Appellate would have to demonstrate that the discretion has been formal to have been exercised arbitrarily or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunction. As appeal against the exercise of discretion is an appeal on principle. (Wander Ltd. And Anr. Vs. Antox India Pvt. Ltd., 1990 Supp1 SCC 727; Skyline Education Institute (India) Pvt. Ltd., 2010 2 SCC 142)

[12] Considering the aforesaid legal principles, on perusal of the materials placed on record, it appears that there is no dispute as to execution of agreement to sale dated 17.05.2015 (Marked 3/1), whereby the land was agreed to be sold at the sale consideration of Rs.85,00,000/- per vigha. It appears from the said agreement to sale that at the time of execution, Rs.56,35,000/- was paid to the defendant. As per clause 4 and 5 thereof, out of total sale consideration amount for the land falling in railway margin and DP road was to be deducted. Further, it also reveals that NA permission for the land was to be obtained by the plaintiff in the name of the defendants and the defendant was obliged to comply with the same. It appears from the said agreement to sale that total cash amount of Rs.8,40,10,700/- came to be paid to the defendants and they have put their signatures below each payment to them. Further, on perusal of the document mark 3/4 (paper book page 38) which is a triparte agreement dated 19.05.2016, entered into between the plaintiff, defendant and the neighbour land owner for the construction of way, wherein, there is a recital regarding the purchase of the land by the plaintiff from the defendant. It also appears from the record that on 16.09.2016, the suit land has been converted into NA land and 198 plots have been drawn. The facts of TP road to be of 491.77 square meters has been reflected in the order of the NA. It appears from the mark 3/14 (paper book page no.86) which is an objection dated 26.10.2016, raised by the defendants against application filed by the neighbour for his land to get NA permission, in the said objection, the defendant has clearly admitted that the plaintiff has spent huge amount on the suit land and has right over the land in question. Further, as per the lay out plan which is at mark 3/7 (paper book page no.107) it was sanctioned by the Jamnagar Mahanagarpalika on 03.06.2016. Thus, the factum of purchase of the land by the plaintiff from the defendant has been categorically admitted by the defendants.

[13] Further, it also appears from the documents marked at 3/2 which is dated 18.11.2017, there is a recital in clause 3 thereof that the defendants have accepted the

receipt of amount of Rs.8,40,00,000/- from the plaintiff for the suit land. The other conditions in the said agreement is some what similar to that of earlier agreement of the year 2015. Further, it reveals from the registered agreement to sale for the suit property of 198 plots, mark 3/3 (page 19 of the paper book dated 29.12.2018), that there is a specific averments made in the said documents that the plaintiff has purchased the entire land earlier by agreement dated 17.06.2015 and the defendant has agreed to execute requisite sale deed in favour of the individual plot holders as averred in the registered agreement to sale.

[14] It is pertinent to note that the defendants have issued notice dated 06.10.2021 revoking the agreement dated 17.06.2015 wherein he has not raised any question of undue influence nor has referred to the subsequent agreement and that of registered agreement to sale dated 29.12.2018. The entire facts relating to the aforesaid documentary evidence clearly prima facie establishes that there was an agreement to sell the land in favour of the plaintiff by the defendants and they have accepted huge amount from the plaintiff. Of course in their written statement the defendants have denied of having such receipt of the amount. However, on perusal of the agreement to sale it clearly transpires that they have put their signature in token of receipt of the cash amount from the plaintiff at the relevant point of time and even in the second agreement they have accepted the receipt of more than Rs.8,00,00,000/- from the plaintiff. It also reveals from the triparte agreement and the objection raised by the defendant against the application filed by the neighbour for NA permission for his land, wherein defendant has accepted that the plaintiff has spent huge amount towards the land in question and has right over the suit land. Of course, there is some dispute regarding the legal possession of the land. But on consideration of all the facts and circumstances of the case and conduct of the defendant, prima facie it appears that defacto possession is with the plaintiff. Further, there is an agreement to sale executed between the parties and the defendants have pocketed huge amount from the plaintiff an in other proceedings they have accepted the right of the plaintiff over the suit land and the suit is for specific performance of the contract. It is necessary that the defendant does not create any third party interest in the suit property. If no restraining order is passed in favour of the plaintiff then the defendant might create third party interest on the property which may lead to multiplicity of proceedings and the plaintiff would be put to much inconvenience whereas, if the defendant is restrained from doing so, no prejudice is likely to be caused to him and if ultimately the suit of the plaintiff fails, then the defendant could be awarded damages in terms of money.

[15] It appears from the impugned order that the learned Trial Court has even not bothered to refer to the conditions mentioned in all these documents and has simply passed the impugned order and has misdirected itself. The trial Court ought to have

considered the facts that the suit is for specific performance of the contract and the defendant has pocketed huge amount and even has accepted that the plaintiff has right over the property. Thus the impugned order of the trial Court is clearly arbitrary and perverse and needs to be interfered with by this Court.

[16] In view of the above, the present Appeal From Order is liable to be allowed. Hence this Appeal From Order is allowed. The impugned order dated 27.05.2022 passed below exhibit 5 in Special Civil Suit No.19 of 2021 by the learned 4 th Additional Senior Civil Judge, Jamnagar is hereby quashed and set aside. The application at exhibit 5 preferred by the plaintiff before the trial Court is hereby allowed to the effect that the defendant shall not create any third party rights or shall not assign or transfer or mortgage or create any sort of encumbrances over the suit property nor shall interfere with the defacto possession of the plaintiff over the suit land till the final disposal of the suit.

[17] Considering the nature of the suit and the involvement of the issue, the trial Court is hereby directed to expedite and to dispose of the suit as early as possible, preferably within a period of six months from the date of receipt of copy of this order. Parties are directed to cooperate with the trial Court for earlier disposal of the suit. No order as to costs.

In view of the order passed in the main matter, Civil Application does not survive and the same stands disposed of accordingly.