

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/APPEAL FROM ORDER NO. 35 of 2021****With****CIVIL APPLICATION (FOR STAY) NO. 1 of 2021
In R/APPEAL FROM ORDER NO. 35 of 2021**

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GITABEN GOVINDBHAI PATEL
Versus
RAMESHBHAI HIRABHAI PATEL

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Appearance:
MR MEHUL SHARAD SHAH(773) for the Appellant(s) No. 1
for the Respondent(s) No. 1
MR JIGNESH B SHAH(5217) for the Respondent(s) No. 1
MR PARESH M DARJI(3700) for the Respondent(s) No. 1
=====**CORAM: HONOURABLE DR. JUSTICE A. P. THAKER****Date : 15/03/2022****ORAL ORDER**

1. Being aggrieved and dissatisfied with the order dated 31.3.2021 passed below Exh-5 in Special Civil Suit No. 72 of 2020 by the learned Principal Senior Civil Judge, Gandhinagar whereby the application for interim injunction came to be rejected, the original plaintiff- appellant has preferred this Appeal from Order under Order 43 Rule 1 of the Code of Civil Procedure, 1908.
2. The brief facts of the matter is that the appellant has filed the Suit against the respondent for specific performance of contract and permanent injunction on the basis of agreement to sell entered into between the parties for land bearing Survey No.166 (Old Survey No. 252) admeasuring 9640 sq. mtrs, at Village: Zank, Taluka: Dehgam for the consideration of Rs.3,22,82,432/-. It is the

case of the appellant that she has paid Rs. 51 Lakh on 2.4.2019 under the agreement to sell, which was notarised. According to the appellant, Rs. 5 lakh was paid by cheque of the State Bank of India whereas rest of the amount of Rs. 46 Lakh was paid by cash and the defendant-respondent has admitted receipt thereof. According to the appellant-plaintiff, there was condition in the agreement to sell that defendant-respondent has to execute the sale-deed after obtaining NA permission and after such permission being obtained, the plaintiff has to pay 30% of the amount and remaining would be paid thereafter.

- 2.1 It is further case of the appellant-plaintiff that NA permission was granted by the Collector, Gandhinagar vide order dated 28.9.2019, which the plaintiff came to know from the on-line verification and, therefore, plaintiff went to the office of the defendant with 30% amount, but the defendant refused to accept the same and also refused to execute the document thereof. According to the plaintiff, therefore, legal notice was issued on 23.12.2019 which was not replied by the defendant. The plaintiff has also shown ready and willingness to perform her part of contract. On these facts, the plaintiff filed the aforesaid Suit for specific performance of the agreement to sell and also prayed for permanent injunction. The plaintiff has also moved an application for interim injunction under Order 39 Rule 1 & 2 of Code of Civil Procedure for temporary injunction during the pendency of the Civil Suit.

3. It appears that on the basis of the application and the Written Statement, the trial Court has rejected the application on the ground that there is dispute regarding payment of cash amount and the plaintiff has not come with clean hands.
4. Heard Mr. Mehul Sharad Shah, learned advocate for the appellant-plaintiff and Mr. Paresh Darji, learned advocate for the respondent-defendant. Perused the material placed on record.
5. For the brevity and convenience the parties are referred to herein as per their status before the trial Court i.e. plaintiff and defendant.
6. Mr. Mehul Sharad Shah, learned advocate for the plaintiff has vehemently submitted that there was an agreement to sell of the property in question which is a land situated at village: Zank for a consideration of about Rs. 3 Crores and out of which, Rs. 51 Lakh was paid at the time of agreement to sell. He has also submitted that out of Rs.51 Lakh, Rs. 46 Lakh was paid in cash and Rs.5 lakh was paid by cheque. He has submitted that defendant has only raised the dispute regarding cash payment of Rs. 46 lakh but he has not denied the execution of agreement to sell. It is submitted that in view of the earlier direction, the plaintiff has produced the relevant document showing her financial capacity for making payment and has also filed necessary affidavit thereof in Civil Application No.1 of 2021. He has

submitted that the plaintiff is ready and willing to deposit the remaining amount of almost Rs. 2.5 Crores before the trial Court. He has submitted that the plaintiff is always ready and willing to perform her part of the contract. He has also submitted that the plaintiff has family business of construction and they have other lands available in the same village.

- 6.1 Mr. Shah also submitted that as per the condition stipulated in the agreement to sell, the defendant had to get necessary NA permission from the authority and on such permission being obtained, the plaintiff had to pay 30% amount thereof and the remaining amount was paid thereafter as per the stipulation made in the agreement to sell. He has submitted that though the defendant has obtained NA permission, he did not informed the plaintiff and upon on-line verification, as the plaintiff came to know regarding granting of NA permission to the defendant, the plaintiff has approached the defendant with payment of 30% amount and informed him to execute necessary document thereof as stipulated in the agreement to sell. According to him, the defendant did not agreed. He submitted that therefore the plaintiff issued legal notice on 23.12.2019. The defendant has not replied the same, and therefore, the plaintiff has filed the Suit for specific performance. He has submitted that since the agreement to sell was notarised under Section 85 of the Evidence Act, it ought to have been considered at this stage and the defendant has also not disputed the execution of

agreement to sell.

6.2 Mr. Shah, learned advocate, while referring to the impugned order of the trial Court, has vehemently submitted that the trial Court has even not considered the factual aspect and merely passed the order in a cryptic manner on the basis of the fact that there is a dispute of payment of cash amount and the plaintiff has not come with clean hands. He has submitted that the observations made by the trial Court is wrong and the entire order is an unreasonable order. He has submitted that since there is an agreement to sell entered into between the parties, if no interim injunction is granted in favour of the plaintiff, then there might be multiplicity of proceedings. Therefore, the interim relief is required to be granted in favour of the plaintiff and further submitted that the suit may be expedited. He has relied upon the following decisions in support thereof:

- (1) Ziyauddin Abdul Hamid Sheikh v. Dinaz Bejan Ankleshwariya, reported in 2017 (2) GLH (UJ) 2;
- (2) Baldevbhai Atmaram Patel v. Savitaben Wife of Shivabhai Keshavlal Patel, reported in 2015 JX (Guj) 1445;
- (3) Taufik Idrishbhai Patel (Ghanchi) v. Nurabhai Alibhai Momin (Bhagat), reported in 2021 (1) GLH 569.

7. Per contra, Mr. Darji, learned advocate for the defendant, while submitting the written statement of the defendant,

has submitted that the defendant has clearly stated in the written Statement in Para-10 that he has no received any cash payment from the plaintiff and he has only received Rs. 5 Lakh through bank. He has also submitted that there was no cash transaction and even if there is cash transaction, it is against the provisions of law. He has submitted that the plaintiff has not shown readiness before the trial Court in respect of performance of her part of contract and during this proceedings such readiness has been shown. He has submitted that if the Court comes to the conclusion that the trial Court has not properly decided the application of the plaintiff, then the matter be remanded back to the trial Court with direction to hear Exh-5 afresh by providing opportunity to both the parties.

8. In rejoinder, Mr. Shah has submitted that there is no question of remanding the matter to trial Court. He has submitted that regarding the appellant's ready and willingness to perform her part of contract was already informed to the defendant by way of legal notice and the defendant has not replied to the Notice thereof. He has submitted that since the legal right of the property is involved, interim injunction be granted in favour of the plaintiff.
9. In case of Ziyuddin Adbul Hamid Sheikh v. Dinaz Bejan Ankleshwariya (Supra), it was observed that in the case of agreement of sale relating to immovable property , time is not of the essence of the contract unless specifically

provided to that effect.

10. In case of Baldevbhai Atmaram Patel v. Savitaben Wife of Shivabhai Keshavlal Patel (Supra), the coordinate bench of this Court has referred to the decision of the Supreme Court in the case of Motilal Jain v. Ramdasi Devi (Smt) and Others, reported in (2000) 6 SCC 420, wherein it was held that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the Plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfill his part of the obligation under the contract which is the subject matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of the contract.
11. In the case of Taufik Idrishbhai Patel (Ghanchi) v. Nurabhai Alibhai Momin (Bhagat), the coordinate bench has observed that under Section 21 of the Specific Relief Act, a plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly. Thus, by virtue of this provision, a plaintiff can very well make alternative prayer in a suit for specific performance, for such a prayer, temporary injunction is not barred under the law in a fit

case.

12. It appears from the pleading of the parties that there is no dispute regarding the execution of agreement to sell and the condition thereof regarding defendant's obligation of obtaining NA permission from the authority. The conditions of obtaining NA permission and after making payment thereof of 30% thereof is also not denied by the defendant. It also appears from the record that the plaintiff has issued legal notice to the defendant for execution of the requisite sale-deed on the basis of the agreement to sell, the same has not been replied by the defendant.
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.

14. Having considered the submission on behalf of both the parties, coupled with the material placed on record and on perusal of the impugned order of the trial Court, it is pertinent to note that in the present case, the learned trial Court has merely decided the application only on the basis of the dispute of non-receipt of cash amount by the defendant from the plaintiff and has rejected the application of interim injunction. At this juncture, it also appears from the record that the trial Court has referred in its order that there is a dispute regarding the right of way. However, on perusal of the plaint as well as written statement, no dispute regarding right of way is born out. It appears that the learned trial Court even has not referred to the pleading of the party and in mechanical and cryptic manner, has passed the impugned order. Had the learned trial Judge read the entire pleadings of the parties and the agreement to sell and the legal notice, he would have not made such mistake and that too of the dispute of right of way between the parties. The observation of the trial Court appears to be with non-application of judicial mind.
15. Considering the facts and circumstances of the present case, admittedly there is an agreement to sell in favour of the plaintiff and legal notice was issued to the defendant for performance of agreement to sell, which is not denied by the defendant. Thus, there is prima-facie case in favour of the plaintiff and if the property changes hands then the

plaintiff would have to indulge in multiplicity of litigation which cannot be compensated in terms of money.

16. Thus, all the three ingredients of granting interim injunction i.e. prima-facie case, irreparable loss and balance of convenience are in favour of the plaintiff.
17. In view of the aforesaid discussion and observation, the present appeal needs to be allowed. Accordingly it is allowed. The impugned order dated 31.3.2021 passed below Exh-5 in Special Civil Suit No. 72 of 2020 by the learned Principal Senior Civil Judge, Gandhinagar is hereby quashed and set aside. The application filed by the present appellant-plaintiff in Exh-5 is hereby allowed. There shall be ad-interim injunction against the defendant in terms of Para-11(A) of the Exh-5 filed in Special Civil Suit No. 72 of 2020 till the final disposal of the suit.

No order as to costs.

In view of the main Appeal being allowed, the Civil Application does not survive and the same stands disposed of accordingly.

SAJ GEORGE

(DR. A. P. THAKER, J)