

**(2022) 03 GUJ CK 0027**

**In the Gujarat High Court**

**Case No :** R/Appeal From Order No. 113 Of 2021, Civil Application (For Stay) No. 1 Of 2021

Ashishsinh Dolatsinh Rana

APPELLANT

Vs

Jashvantlal Nanchand Shah

RESPONDENT

**Date of Decision :** 07-03-2022

**Acts Referred:**

Transfer Of Property Act, 1882 — Section 54

**Citation :** (2022) 03 GUJ CK 0027

**Hon'ble Judges :** Dr. A. P. Thaker, J

**Bench :** Single Bench

**Advocate :** MJ Mehta, Nirad D Buch, Saurabh J Mehta, Bhavini N. Buch, NV Gandhi

**Final Decision :** Disposed Of

## Judgement

Dr. A. P. Thaker, J

1. Being aggrieved and dissatisfied by impugned Order dated 17.3.2020 passed below Exh-5 by the learned Principal Senior Civil Judge and Additional Chief Judicial Magistrate, Olpad in Special Civil Suit No. 18 of 2019, the original defendant Nos. 2 and 3 have preferred this Appeal from Order under Order 43, Rule 1 of the Code of Civil Procedure, 1908.

2. By the impugned order the trial Court has restrained the present Appellants – original defendant Nos. 2 and 3 from selling, transferring, alienating the suit property in question. 3. The brief facts of the case, as narrated by the appellants herein is that the agricultural land of Block No. 121 ad-measuring 01-22-42 Hec-Acre-Sq. Mtr. situated at village Kathodara, Taluka : Olpad, District: Surat was belonging to respondent No.1 (original plaintiff). The said land in question came to be sole by original owner to respondent No.2- original defendant No.1 by registered sale-deed dated 25.1.2018. The same was registered vide Registration No. 1447 before the Sub-Registrar, Olpad and Mutation entry in Revenue Record

came to be entered vide Entry No. 7132 dated 26.2.2018, which came to be certified on 30.5.2018.

3.1 The said land came to be purchased by the present Appellants – original defendant Nos. 2 and 3 from respondent No.2- defendant No.1 vide Registered sale-deed dated 3.7.2018 by paying sale consideration of Rs. 40 Lakh and same was duly registered vide registration No. 11639 before the Office of Sub-Registrar, Olpad and the same came to be mutated in the revenue record vide Entry No. 7140 dated 3.7.2018 and came to be certified on 7.8.2018. According to the Appellants, thus they became legal owners and occupier of the land in question.

3.2 The plaintiff i.e. Respondent No.1 filed the aforesaid Civil Suit No. 18 of 2019 against the respondent No.2 along with present Appellants and sought quashment of both the sale-deed dated 25.1.2018 and 3.7.2018 and in the alternative sought the market price of the land in question i.e. Rs. 20 Lakh along with interest from the defendant No.1. According to plaintiff, he has preferred the Suit on the ground of non-payment of sale consideration by the original defendant No.1. According to appellants, when they came to know regarding the filing of the Suit, they went to the original defendant No.1 from whom they have purchased the land in question and at that time, he informed them that he had paid remaining amount of sale consideration to the original plaintiff and for that there is no need to engage the lawyer and appear in the Suit proceedings as the original plaintiff is going to withdraw the Suit. It is contended that due to this fact, they did not appeared in the Suit proceedings.

3.3 It is contended that since trial Court has passed the order against them and they came to know regarding the same when they obtained village Form No. 7(12), they immediately inquired about the status of the suit proceedings. Upon inquiry, it was known to them that their right to filing of reply has been closed by the Court below and exparte-order has been passed. It is alleged that there was complete lockdown due to Covid-19 Pandemic and, therefore, the Appellants could not initiate appropriate proceedings at the relevant point of time. It is also contended that on 11.9.2020, they had moved an application in the Suit proceedings with prayer to recall the order dated 17.3.2020 and prayed to hear and decide the Application Exh-5 afresh by permitting them to submit their reply. It is also contended that they have also submitted that their written reply along with documents. It is also contended that it was advised to them to file Appeal from Order before this Court and not to press that application. Under the circumstances, they have filed the present Appeal from Order.

3.4 The main grounds raised by the appellants herein is that they are bonafide purchasers of the land in question and they have paid sale-consideration of Rs. 40 Lakh by Cheque and purchased the same by registered sale-deed. According to them, the original plaintiff and defendant No.1 have in connivance with each other, has filed the present Suit with a view to snatch away the land in question from the appellants and the respondents want to avail undue monetary benefit

by filing false Suit against them. According to the Appellants, if at all the amount of sale consideration is not paid, then, the original plaintiff could file Suit for recovery of the said amount but the sale deed cannot be cancelled on that ground. It is also contended that the plaintiff has also alternatively prayed for relief of Rs.20 Lakh towards sale transaction. It is also contended that there is no averment made in the sale deed between plaintiff and defendant No.1 that in case of return of cheque, the sale transaction could be termed as cancelled. It is contended that since the appellants were bonafide purchaser, no injunction ought to have been granted against them. According to them, the ingredients of granting interim injunction is not in favour of the plaintiff but rather it is in their favour. The appellants have relied upon the decision reported in AIR 2020 SC 3310 and has prayed to allow this appeal and set-aside the impugned order passed against them by the trial Court in Special Civil Suit No. 18 of 2019.

4. Heard Mr. Saurabh Mehta, learned advocate for the appellants, Mr. N.V.Gandhi, learned advocate for respondent No.1 (original plaintiff) and none has appeared for respondent No.2 though served. Perused the material placed on record.

5. Mr. Saurabh Mehta, learned advocate for the appellants has vehemently submitted the same facts which are narrated hereinabove. He has submitted that the Appellants are the bonafide purchasers. According to him, if the defendant No.1 has not paid sale consideration to the plaintiff, then the plaintiff could file Suit for recovery of amount of sale consideration. He has also submitted that the plaintiff has also sought for alternative relief of recovery of Rs.20 lakh from defendant No.1. According to him, since the plaintiff can be compensated in terms of money, no interim injunction ought to have been granted in favour of the plaintiff. He has also submitted that as the defendant No.1 has told the appellants that the plaintiff is going to withdraw the suit, he did not appear before the trial Court. He has submitted that under the circumstances, the Appellants had no opportunity of being heard on the application Exh-5 and the application has been decided in their absence. He has also submitted that the appellant has also moved an application under Order 7 Rule 1 (D) before the trial Court, which is pending. He has relied upon the decision in case of Vidhyadhar v. Manikrao and Another, reported in (1999) 3 SCC 573, for his proposition that actual payment of full price at the time of execution of sale deed is not a sine qua non for completion of sale. He has submitted that in of this, the relief which can be made available to the plaintiff is regarding directing the original defendant No.1 to pay the remaining sale price. According to him, under the circumstances, the Appeal may be allowed and the impugned order of the trial Court be set-aside.

6. Per contra, Mr. N.V.Gandhi, learned advocate for the original plaintiff-responder No.1 has vehemently submitted that the appellants herein have initially move the trial Court for re-hearing of the Exh-5 by providing the opportunity of being heard however, the same came to be not pressed without any permission sought for from the trial Court. He has submitted that the

plaintiff is unpaid seller of the property and, therefore, defendant No.1 has no better title. He has also submitted that since defendant No.1 has no better title, he could not pass any title to the present Appellants – defendant Nos. 2 and 3 before the trial Court. He has also submitted that there was no notice transaction between the parties and, therefore, the present appellants cannot be treated as bonafide purchaser. He has submitted that the plaintiff had issued Notice to defendant No.1 regarding the sale price and during the pendency of that notice transaction, the present appellants- original defendant Nos. 2 and 3 have purchased the land and hence they cannot be treated as bonafide purchaser. According to him, since sale-deed is executed without payment of price, it is not a sale in the eyes of law and, therefore, the present appellants cannot have any legal rights over the property as there was no averments of legal right to defendant No.1. In response to this averment, he has relied upon the decision of Apex Court in the case of Kewal Krishan v. Rajesh Kumar & Ors, dated 22.9.2021 rendered in Civil Appeal Nos. 6989-6992 of 2021. He has prayed to dismiss the present appeal.

7. In rejoinder, Mr. Saurabh Mehta, learned advocate for the appellant has submitted that the appellant herein has clearly made averment before the trial Court in Exh-14 (Page-94 of the paper-book) to the effect that when they came to know regarding the Suit, having been filed, they approached defendant No.1 and at that time defendant No.1 had delivered them with the sale price paid and they have not to appear through advocate and the suit is likely to be withdrawn and the Suit is filed only for the purpose of income-tax. He has also referred to prayer in that application and submitted that due to lockdown, appropriate application could not be made immediately.

8. In case of Vidhyadhar v. Manikrao and another (Supra), by dealing with Section 54 of the Transfer of Property Act, the Apex Court in Para-36 has observed as under:

"36. The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of whole of the price at the time of the execution of sale deed is not sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs. 100/-, the sale would be complete".

9. In the case of Kewal Krishan v. Rajesh Kumar & Ors. Etc. (Supra), the Apex Court while dealing with the Section 54 of the Transfer of Property Act, in

Para-15 has held that:

"15. ....Hence, a sale of an immovable property has to be for a price. The price may be payable in future. It may be partly paid and the remaining part can be made payable in future. The payment of price is an essential part of a sale covered by section 54 of the TP Act. If a sale deed in respect of an immovable property is executed without payment of price and if it does not provide for the payment of price at a future date, it is not a sale at all in the eyes of law. It is of no legal effect. Therefore, such a sale will be void. It will not effect the transfer of the immovable property".

10. Having considered the submissions made on behalf of both the sides, coupled with the material placed on record, it transpires that the Plaintiff has filed the Suit against the respondents contending that respondent No.1 has not paid the full consideration price. According to the plaintiff, the sale-deed was executed and the defendant No.1 has issued cheques for consideration and one cheque came to be honoured while rest of the cheques were honoured. In view of the observation made in both the decisions, referred to hereinabove, the price may be paid or may be promised to be paid, the sale of property would be complete on the registration of the document wherein full price is paid or either it is partly paid or partly agreed to be paid in future. In case of non-payment of remaining payment, the seller can file a suit against the purchaser for recovery of the remaining amount for cancellation of the sale-deed. However, if there is another transaction occurred between other parties, then in that case, third party who has no knowledge regarding non-payment of consideration by its predecessor, such third party cannot be restrained from dealing with this property legally.

11. Now, in this case, it appears from the record that initially the appellants herein have not appeared on the pretext that the defendant No.1 had informed that the Plaintiff is going to withdraw the Suit and the Suit is filed only for Income Tax purpose. Under the circumstance, in absence of the present appellants, the trial Court has decided the Exh-5 Application. Thus, no opportunity has been provided to appellants herein. It also appears from the material placed on record in the trial Court for granting them opportunity of being heard in response to Exh-5 but the same came to be not pressed. On that count, it has been contended by the Appellant that they had been permitted to file their written statement and reply to the interim injunction application by the trial Court by order dated 1.1.2020 by imposing the cost of Rs. 10,000/- payable to the Taluka Legal Services Committee. Thus, now the pleading of both the parties are available before the trial Court. It is admitted fact that the trial Court had no opportunity to consider the stand of defendant Nos. 2 and 3 i.e present appellants and, therefore, it is in the interest of justice that the order of the trial Court needs to be set-aside and trial Court is required to be directed to decide the interim Application Exh-5 by hearing all the parties.

12. In view of the above, the present Appeal from Order is allowed. The impugned Order dated 17.3.2020 passed below Exh-5 by learned Principal Senior

Civil Judge and Additional Chief Judicial Magistrate, Olpad in Special Civil Suit No. 18 of 2019 is hereby quashed and set-aside.

13. The trial Court is hereby directed to hear the Exh-5 afresh in accordance with law after affording an opportunity of being heard to both the sides. Such exercise to be completed as early as possible preferably within a period of one months from the date of receipt of this order.

No order as to costs.

Civil Application, if any, stands disposed of accordingly.