

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/FIRST APPEAL NO. 1499 of 2001**

With
CIVIL APPLICATION NO. 1 of 2001
In R/FIRST APPEAL NO. 1499 of 2001

FOR APPROVAL AND SIGNATURE:**HONOURABLE MR. JUSTICE DEVAN M. DESAI**

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Approved for Reporting	Yes	No

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USHABEN USHAKANT SHUKLA & ANR.

Versus

SUDHABEN DEVENDRAKUMAR PATEL & ORS.

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Appearance:

MR MANISH M KAUSHIK(5048) for the Appellant(s) No. 1.1

DELETED for the Defendant(s) No. 2,3

MR TATTVAM K PATEL(5455) for the Defendant(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE DEVAN M. DESAI**Date : 25/02/2026****ORAL JUDGMENT**

1. The present First Appeal is filed under Section 96 of the Code of Civil Procedure, by the appellant – original defendant No. 2, challenging the judgment and decree dated 26.02.2001, passed by the City Civil Court at Ahmedabad in Civil Suit No. 9 of 1995.

2. Heard learned advocate Mr. Manish Kaushik for the appellants and learned Senior Advocate Ms. Trusha Patel with learned advocate Mr. Tattvam Patel for the respondents.

3. The brief facts of the case are as under:

3.1 The plaintiff wanted to buy suit property, which is situated in Sub-plot No. 1A of, Mahagujarat Saurabh Cooperative Housing Society Limited, near Ankur, Naranpura, Ahmedabad. The property is consisting of ground floor and first floor with open space surrounding construction. The three shops are occupied by tenants. Plaintiff had agreed to purchase suit property with sitting tenants. The sale price was fixed at Rs.5,50,000/- plus Rs.50,000/- to be paid to society towards transfer fees. Plaintiff paid an amount of Rs.25,000/- and Rs.1,75,000/- by way of demand drafts in favour of defendant No. 1. Plaintiff further paid an amount of Rs.3,50,000/-. Defendant No. 1 issued receipts in favour of plaintiff. The possession of ground floor and open land was handed over to the plaintiff and writing to that effect was executed by defendant. On

28.12.1994, defendant No. 2 issued a public Notice for title clearance. Thereafter, plaintiff filed a suit, praying for specific performance and further sought relief of possession of first floor of the suit property together with a relief of permanent injunction, restraining defendants from transferring or alienating the suit property in any manner, whatsoever. Plaintiff further sought for a relief of permanent injunction restraining defendants from interfering with the possession of the open land and the ground floor portion of the suit property. Defendant Nos. 1 and 2 appeared and filed written statements at Exhibit – 13 and Exhibit – 15, respectively, and contested suit. Plaintiff filed affidavit in lieu of examination-in-chief at Exhibit – 37. Plaintiff examined witnesses, Devendra Kumar Patel at Exhibit – 49, a tenant, Vishnu Bhai Narayan Das Patel at Exhibit – 54 and, Yogesh Shivala Shah, an officer of Madhupura Mercantile Co-operative Bank at Exhibit – 61. Defendant No. 1 did not lead any evidence. Defendant No. 2 filed affidavit in lieu of examination-in-chief at Exhibit – 74 and examined Mahendra Kumar Atmaram Patel, secretary of the Society at Exhibit – 95. Defendant No. 3 filed affidavit in lieu of examination-in-chief. Following issues were

framed at Exhibit – 31:

- “1. Whether the plaintiff proves that the defendants are the owner of the suit premises?*
- 2. Whether the plaintiff proves that she has entered into an agreement with the defendant to sell the suit premises?*
- 3. Whether the plaintiff proves that he has paid full consideration to the defendants and obtained the possession of the suit premises except a shop and the first floor?*
- 4. Whether the plaintiff is entitled for the specific performance and other ancillary reliefs?*
- 5. Whether defendant No. 1 proves that the suit is barred by limitation?*
- 6. Whether the defendant No. 2 proves that this Court has no jurisdiction to try and entertain the suit?*
- 7. Whether the defendant No. 2 proves that she is the absolute owner of the suit premises and defendants 1 and 3 have no right title interest over the suit premises?*
- 8. What order and decree?”*

After considering the evidence on record, learned Trial Court decreed the suit and further ordered defendant to make application to the Collector for the permission within one month and to execute a sale deed in favour of plaintiff within one month from the receipt of the permission.

3.2 Being aggrieved and dissatisfied with the judgment and decree, the appellant – original defendant No. 2 has filed the present First Appeal.

4. Learned advocate of the appellants submitted that there is no pleading on behalf of the plaintiff claiming that the original defendant No. 1 was acting as an agent of present appellant, neither any issue to that effect was framed by the learned Trial Court, nor any evidence was led by plaintiffs regarding the same. However, the learned Trial Court decreed the suit by holding that original defendant No. 1 was acting as an agent of the present appellant. The present appellant has not received any amount of sale consideration from the original plaintiff nor has she signed any payment receipt. The appellant has claimed to be the owner of the suit property and the issue qua the ownership of suit property is held in favour of the appellant. There was no pleading or case made by the original plaintiff with regard to any distinction between the ownership of the plot and the ownership of superstructure. The suit was for specific performance based on an oral agreement concerning the suit property as described in the plaint. The appellant asserted her ownership right over the suit property, and the learned Trial Court held that she is the owner of the suit property. This finding has not been challenged by the original plaintiff.

5. Learned advocate for the appellants further submitted that, in her cross-examination at Exhibit – 37, the appellant stated that she had not made any enquiry with the society regarding ownership before purchasing the property. She has further admitted that she has not made any enquiry with the village records as to whether the property had been sold by original defendant Nos. 1 and 3 to the present appellant, nor whether her name had been entered in the *panipatrak*. Likewise, the husband of the plaintiff, in his cross-examination at Exhibit – 49, admitted that he came to know about the fact that original defendant Nos. 1 and 3 have sold the property in question to the present appellant only after the filing of the suit. When the original plaintiff and her husband, themselves were unaware of the ownership of the present appellant prior to the purchase, the plaintiff's claim that original defendant No. 1 was acting as an agent of the present appellant cannot be considered *bona fide* or genuine contention and it is clearly an afterthought. In her cross-examination, she has admitted that she was aware that a member cannot sell the land without the permission of the State Government, and also admitted that she had made no enquiry with the Collector's office or the society. Therefore, no question arises of any agreement being executed between the parties regarding

sale and purchase of suit property. And for this reason also, it cannot be said that there was concluded contract between the parties.

6. It is submitted by learned advocate for the appellants that it is settled proposition of law that the burden of proving the existence of a concluded oral agreement lies on the plaintiff. From the evidence on record, the original plaintiff has failed to prove the agreed amount of sale consideration. Except above, no other submissions were canvassed by learned advocate for the appellants.

7. Per contra, learned Senior Advocate for the respondent – plaintiff has supported the judgment and decree and contended that the plaintiff, who was a gynecologist, intended to purchase the suit property as her father-in-law was residing next to the suit property. Therefore, she agreed to purchase the suit property with sitting tenants on the ground floor for a total consideration of Rs.5,50,000/-, plus Rs.50,000/- towards transfer fee. The plaintiff paid the full agreed amount of consideration along with Rs.10,000/- to defendant No. 1 towards transfer fee. It is submitted

that Plot No. 1A was originally allotted to Ushakant Shukla by the Society on 12.10.1980. Upon the death of Ushakant Shukla, an application was submitted by the defendants and Hemaben – daughter of the appellant, to the Society for including the name of defendant No. 1 – Rajiv Ushakant Shukla as a member in place of the deceased member. The Society passed a resolution on 14.06.1981 and mutated the name of defendant No. 1 in its records as member of the society. Though a sale deed was executed by the children of deceased Ushakant Shukla in favour of defendant No. 2 on 29.03.1985, the said sale deed pertained only to the superstructure standing on Plot No. 1A and not the land beneath it. Defendant No. 3, in his oral deposition, has admitted that the sale was only for the superstructure. It is further contended that, despite execution of the sale deed, the land beneath the superstructure remained joint property of all defendants, and defendant No. 1 was administering and managing the suit property and accepting money on behalf of all family members. The shop situated on the front side of the ground floor was let out to Vishnubhai Patel by defendant No. 1, with whom a rent note dated 05.05.1986, Exhibit – 56, was executed, and rent receipts were also issued by defendant No. 1. A Memorandum of Understanding

dated 30.03.1993, Exhibit – 105, was executed by defendant No. 1 – Rajiv Shukla in favour of Balakrishna Shah, pursuant to which the first-floor construction came into existence in the year 1993. A banakhat was executed by all the defendants in favour of Rajesh Parikh at Exhibit – 75, wherein it was specifically mentioned that the land stood in the name of defendant No. 1 in the Society records. Subsequently, a cancellation deed dated 11.09.1993, Exhibit – 76, cancelling the said banakhat, came to be executed, and it is contended that the amount paid by the plaintiff as consideration was utilized for making payment to Rajesh Parikh towards such cancellation.

8. It is further contended that the plaintiff examined a witness from Madhupura Mercantile Cooperative Bank at Exhibit – 61, whose deposition establishes that the amount of consideration was credited in the bank account of defendant No. 1. The said witness also produced pay-in slip at Exhibit – 64 evidencing such credit. Defendant No. 1, despite being a crucial witness, did not enter the witness box to deny the facts pleaded by the plaintiff, including the oral agreement of sale, acceptance of consideration, execution of rent agreement, and handing over of possession.

9. It is further submitted that, as part performance of the oral agreement, the defendants handed over possession of the ground floor along with the open land of the suit property to the plaintiff, while the first floor, which was constructed only in 1993, was retained by the defendants. After handing over possession of the ground floor, the defendants shifted their residence to the first floor. It is submitted that Ushaben has never instituted any suit seeking recovery of possession of the ground floor, nor has she lodged any criminal complaint against the plaintiff, which clearly indicates that the possession handed over to the plaintiff was never treated as unlawful.

10. Learned Senior Advocate for the respondents further submits that Rajiv Shukla, managing the property, has neither challenged the impugned judgment by filing any appeal nor entered the witness box to contest the plaintiff's case. In view of the admitted facts and depositions of defendant Nos. 1 and 3, it is contended that Ushaben cannot now assert that Rajiv Shukla had no authority to enter into the transaction with the plaintiff.

11. It is further submitted that the sale deed dated 29.03.1985 related only to the superstructure on the ground floor, and since the first floor was not in existence at that time, Ushaben cannot claim any right or interest therein.

12. It is further contended that, subject to obtaining necessary permission, a decree for specific performance can lawfully be passed, as there is no statutory prohibition against entering into an agreement to sell. Reliance is placed upon the judgment of the ***Hon'ble Supreme Court in Civil Appeal*** arising out of ***SLP (C) No. 29462 of 2019***, decided on 15.02.2024, which reiterates that such agreements can be specifically enforced in the absence of any legal bar. Except above, no other submissions were canvassed by learned Senior Advocate for the respondents.

13. I have considered the submissions canvassed by the learned advocates for the parties and also perused the record and proceedings. The case of the plaintiff is that the suit property bearing sub-plot number 1A consists of a ground floor and a first floor, which was orally agreed to be purchased by the plaintiff from the defendants for a total consideration of Rs.5,50,000/-. The

plaintiff paid Rs.25,000/- by way of a pay order and, Rs.1,75,000/- by way of a demand draft dated 10.09.1993 and 11.01.1993, respectively, and thereafter paid Rs.3,50,000/- in cash on 11.09.1993 to defendant No. 1 – Rajiv Ushakant Shukla. Defendant No. 1 issued receipts regarding acceptance of money from the plaintiff. Thus, according to the plaintiff, the entire amount of consideration was paid to Defendant No. 1. Even on 21.11.1994 and 25.11.1994, the plaintiff made payments of Rs.5,000/- each to the defendant towards transfer fees. When a public notice dated 30.12.1994 came to be published by defendant No. 2 - Ushaben Ushakant Shukla, the plaintiff found that execution of sale deed has been refused by defendants. Therefore, on 02.01.1995, the plaintiff replied to the said notice, and filed the suit for specific performance together with other reliefs. Defendant No. 1 has filed written statement but has neither cross-examined the plaintiff nor led any oral evidence. In defence, defendant No. 2 has denied the claim of specific performance and also denied the alleged sale transaction. It is the case of defendant No. 1 that defendant No. 2 is not the owner of the suit property, and in the absence of a written contract, no relief of specific performance can be granted. Defendant No. 1 has denied her signatures on Exhibit – 39 to

Exhibit – 44, which are the receipts of sale consideration and the writing regarding handing over possession of the ground floor of the suit property. Defendant No. 2, in her written statement, has taken a similar stand and has contended that by a registered sale deed (Exhibit – 77) dated 21.08.1985, she is the owner of the constructed property. The said sale deed, Exhibit – 77, was executed by defendant Nos. 1 and 3, the daughter of defendant No. 2. Since defendant No. 1 had no authority to sell the suit property, the plaintiff has no right to claim specific performance of the alleged oral agreement. It is also a grievance raised by the learned advocate for the appellants that in the pleadings, the plaintiff has not come out with a case that defendant No. 1 was the agent of defendant No. 2, and being an agent, defendant No. 1 has accepted sale consideration from the plaintiff.

14. Learned Senior Advocate for the respondent – original plaintiff has relied upon the documents and the evidence and has contended that the suit property was initially a land which was allotted to Ushakant Shukla by Mahagujarat Saurabh Cooperative Housing Society Limited. Upon the application, after the death of Ushakant Shukla, all the defendants, made a request to the

society to mutate the name of defendant No. 1 – Rajiv Ushakant Shukla, as a member of the Society. A resolution came to be passed by the Society accepting the application, and thereafter, defendant No. 1 was recorded as a member in the society records. It appears from the record that an MOU dated 30.03.2003 was executed by defendant No. 1 in favour of one Balkrishnaji Shah for the development of the property in question, more particularly the portion above the ground floor. Exhibit – 75 is an agreement to sell dated 11.09.1993 executed by all the defendants in favour of Rajesh Madhavlal Parekh. It is an admitted fact, which culls out from the cross-examination of defendant No. 2, that said agreement to sell came to be cancelled by all the defendants vide Exhibit – 76. The execution of both these documents has been admitted by defendant No. 2. Defendant No. 1, by executing a rent note dated 05.05.1986 (Exhibit – 56) in favour of one Vishnubhai Narandas Patel, who has deposed the fact that defendant No. 1 was accepting rent from him and that rent receipt (Exhibit – 57) and other rent receipts were issued by defendant No. 1. This evidence is sufficient to hold that defendant No. 1 was managing the property and all defendants accepted that the plot below super-structure, though sold defendant No. 1, all the defendants

remained joint owners of plot. The super-structure was also managed by defendant No. 1.

15. It is important to observe that, undisputedly, Exhibit – 77, the sale deed executed in favour of defendant No. 2 – is for the superstructure standing on sub-plot number 1A. Thus, on the date of the sale deed and thereafter, defendant No. 2 became the owner of the superstructure, whereas the land beneath the superstructure stood in the name of defendant No. 1 in the society records. This Court was informed that even today, the name of defendant No. 1 continues to stand as a member of the Society in the society records. It is also important to observe that, pending the first appeal, original defendant Nos. 1 and 3, namely Rajiv Ushakant Shukla and Sanjeev Ushakant Shukla, have expired and were deleted from the array of parties by the appellant. Undisputedly, defendant No. 1, whose name stands as a member in the society records, has not challenged the judgment and decree passed in favour of the plaintiff. Defendant No. 3 has also not challenged the impugned judgment and decree. Only defendant No. 2 has challenged the judgment and decree.

16. It appears from the evidence on record that defendant No. 1 was managing and administering the suit property, and possession of the ground floor portion of the suit property was handed over to the plaintiff by executing a writing (Exhibit – 42) on 11.09.1993. On 10.09.1993, defendant No. 1 also executed an irrevocable General Power of Attorney (Exhibit – 79) in favour of the plaintiff. The said irrevocable Power of Attorney also affirms handing over of possession of the ground floor portion to the plaintiff and, the plaintiff was given possession until return thereof and was further permitted to sell or transfer the property to any other party. The ground floor portion consists of a residential portion as well as three rented shops. The plaintiff was also permitted to collect rent from those tenants and to seek possession from them if so desired. Even in the agreement to sell (Exhibit – 75) executed by the defendants in favour of Rajesh Madhavlal Parekh, the plot is described as an undivided plot. Thus, upon scrutinizing the evidence available on record, one aspect becomes clear, that plot No. 1A stands in the name of defendant No. 1 as a member of the Society, and the superstructure standing on the said sub-plot was transferred by way of a sale deed in favour of defendant No. 2 but virtually defendants being family members accepted the suit

property being joint and defendant No. 1 was permitted to manage the suit property. Except for bare denials by defendant No. 2 in her oral deposition, nothing has been proved by defendant No. 2. As against this, the witness of Madhpura Mercantile Cooperative Bank (Exhibit – 61) has not only produced the pay-in slips of the bank account of Defendant No. 1 but has also produced a statement dated 01.09.1993 (Exhibit – 64). Upon perusal of these evidences, it is established that amounts of Rs.1,75,000/- and Rs.25,000/- were credited in the said account of defendant No. 1, and thereafter, on 15.09.1993, an amount of Rs.1,41,000/- was debited. On 11.09.1993 (Exhibit – 76), a deed of cancellation of the agreement to sell, was executed between the defendants and Rajesh Madhavlal Parekh. This evidence is sufficient to arrive at the conclusion that, out of the amount of Rs.1,75,000/- which was accepted by defendant No. 1, an amount of Rs.1,41,000/- was paid in clearing the repayment of the earnest money paid by Rajesh Madhavlal Parekh.

17. The tenant, Vishnubhai Narandas Patel, in his deposition, Exhibit – 54, has stated that he is tenant of one of the shops on the ground floor of suit property since 1986. Original rent note dated

01.02.1986 was retained by defendant No. 1. According to said witness, defendant No. 1 was accepting rent and rent receipts were issued by defendant No. 1. Rent was paid by said tenant to defendant No. 1 by cheques. In the society records, name of defendant No. 1 is running since 14.06.1981. This fact is revealed from Exhibit – 97, which is a resolution. From the oral deposition of defendant Nos. 2 and 3, it appears that heirs of deceased Ushakant Shukla never objected regarding mutation of name of defendant No. 1 as a member of Society and never objected when defendant No. 1 was dealing with the suit property. Hence, defendant No. 1 undisputedly managed the suit property which he did all throughout till filing of the suit. The heirs of deceased Ushakant Shukla also, by implied consent, permitted defendant No. 1 to manage the suit property including super-structure. Defendant No. 1 has accepted rent from tenants and also accepted full consideration from plaintiff. And defendant No. 1, very conveniently, chose neither to cross-examine the plaintiff nor to lead any oral evidence. Thus, a valid adverse inference can be drawn that defendant No. 1 has accepted the case set up by plaintiff. Denials made in written statement, without any oral evidence in support of such denial is not denial of fact asserted by

plaintiff. Moreover, defendants have not filed any proceedings against the plaintiff for the recovery of possession of ground floor of Plot No. 1A.

18. A finding is deemed to be perverse if it is so unreasonable that no reasonable person could have reached it. If two views are possible based on evidence, the Appellate Court should not substitute its own views for that of the lower Court, even if the lower Court's view is not the only possible one. Thus, considering the facts and overall evidences, I do not find any reason to interfere with the judgment passed by the learned Trial Court. In light of the aforesaid, the present Appeal is dismissed. No order as to costs. Record and Proceedings be sent to the concerned Court / Tribunal forthwith.

19. In view of the disposal of the main matter, the connected Civil Application does not survive and the same is disposed of accordingly.

MUSKAN

(D. M. DESAI,J)