

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SECOND APPEAL NO. 100 of 2013****To****SECOND APPEAL NO. 103 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE N.V.ANJARIA**

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | Yes |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ? | No |
| 5 | Whether it is to be circulated to the civil judge ? | No |

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ASHOKKUMAR JAYANTILAL SHETH THRO'POA GOPALBHAI
MADHUSUDAN....Appellant(s)

Versus

HEIRS OF DECEASED NARMADABEN WIDOW OF NARANBHAI RAMDAS
PATEL & 8....Respondent(s)

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Appearance:

MR MEHUL S. SHAH WITH MR SHITAL R PATEL, ADVOCATE for the
Appellant(s) No. 1

MR P.C. KAVINA, SR. ADVOCATE WITH MS M O NARSINGHANI,
ADVOCATE for the Respondent(s) No. 1.1.1 - 1.1.5 , 1.2 - 1.3 , 2.1 - 2.4 , 4 - 5
RULE NOT RECD BACK for the Respondent(s) No. 1.1
RULE SERVED for the Respondent(s) No. 1.4 , 6 - 8 , 9.1 - 9.6

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CORAM: **HONOURABLE MR.JUSTICE N.V.ANJARIA**

Date : 31/07/2014

CAV JUDGMENT

It was on the following substantial questions of law that the present group of Appeals were admitted by this Court.

"(i) Whether in the facts and circumstances of the case, the appellants-original plaintiffs can be characterized as "representative in interest" within the meaning of Section 15(b) of the Specific Relief Act, 1963, so as to become entitle to seek specific performance pursuant to the Agreements dated 14th September, 1987 read with 11th March, 1986?

(ii) Whether in the facts and circumstances, right of the appellants-original plaintiffs to seek prayers pleaded in the respective Suits survive even after withdrawal of Special Civil Suit No.194 o 1988 and also after dismissal of Special Civil Application No.4976 of 2008?

(iii) Whether in the facts and circumstances, could it not be said that rights of the appellants-original plaintiffs to seek specific performance and the prayers incidental and alternative to the specific performance were salvaged by virtue of observations in 2005 (1) GLR 116 and the clarification made by the Supreme Court in order dated 16th November, 2004 in Special Leaved to Petition (Civil) Nos.22664-22665 of 2004?

(iv) Whether the Courts below committed an error in refusing to decide the question of breach of injunction in the facts of the case?

(v) Whether in the facts and circumstances of the case, the pleadings incorporated in the plaint makes out a prayer for specific performance?"

2. All the four Second Appeals are cognate,

arising from four different Special Civil Suits decided by the Trial Court by common judgment, which being subjected to four different Regular Civil Appeals, the first appellate court decided the Appeals simultaneously passing common judgment and order. They involved common facts and identical issues. They were accordingly heard together and are being decided by this common judgment.

2.1 It is against common judgment and order dated 02nd April, 2013 of learned 7th Additional District Judge, Vadodara delivered in Regular Civil Appeal No.14 of 2012 to Regular Civil Appeal No.17 of 2012, that the present respective Appeals are preferred by the original plaintiffs. Special Civil Suit Nos.657 of 1988 to 660 of 1988 were instituted by the plaintiffs-appellants herein for decree of specific performance. The suits were dismissed and the Regular Civil Appeals also came to be dismissed.

2.2 While admitting these Appeals, interim order dated 27th June, 2013 was passed in Civil Applications for stay being Civil Application No.5045 of 2013 to 5048 of 2013. The operative part of the said interim order was as under:

"5.2 So as to synthesize equity and to balance the rights of the parties during the pendency of the appeal. In the order dated 07th May, 2013, the applicant of each of the applications hereinabove were directed to deposit amount five times more than the amount of consideration involved in each of the respective agreements. Learned advocate for the applicants-appellants stated that

they have already deposited the amount as directed.

6. On the facts involved and after considering the rival submissions, it was clearly found that a strong prima-facie case existed in favour of the applicant and accordingly the appeal was admitted on the questions as above. Denying interim relief would amount to making appeal of the appellant infructuous by another stroke.

7. For the aforesaid reasons and assessing the facts on the prima-facie case, balance of convenience and irreparable injury in the context of the facts of the case, present application is allowed and the adinterim relief granted vide order dated 07th May, 2013 shall continue as interim relief during the pendency of the appeal.

8. Since the parties are litigating since 1988 and as requested by learned advocates for the parties, it is observed that it would be open for either side to seek early hearing of the main appeals after Record and Proceedings are received, which shall be called for by the Registry expeditiously.

9. The Registry is directed to invest the amount deposited by the applicant-appellant in each of the appeals pursuant to the order dated 07th May, 2013 in Fixed Deposit initially for a period of one year fetching maximum interest with any nationalise bank and the same shall be renewed from time to time till the final disposal of the main appeal."

2.3 Against the above interim order, the respondents herein preferred Special Leave to Appeal before the Supreme Court. While dismissing Special Leave to Appeal (Civil) No.16157 of 2013 to 16160 of 2013, the Apex Court passed the following order

requiring this Court to make an endeavour to dispose of the Appeals within six months.

"Delay condoned.

These petitions are directed against the stay order passed by the learned Single Judge of the Gujarat High Court in S.A. Nos.100-103 of 2013.

We have heard Shri Gaurav Agrawal, learned counsel for the petitioners and Shri Amar Dave, learned counsel for the respondents and perused the record.

Although, we are not inclined to interfere with the direction exercised by the learned Single Judge of the High Court to direct the parties to maintain the status quo, keeping in view the length of the litigation, we request the High Court to make an endeavour to dispose of the main appeals as early as possible but latest within six months from the date of receipt/production of a copy of this order.

The special leave petitions are disposed of in the manner indicated above...."

2.4 The Appeals are thereafter came to be posted for final hearing. The record showed that they stood adjourned from time to time. When the Appeals at subsequent stage came to be posted on Board before this Court, it was noticed that by the time period of six months set down by the Apex Court had gone by. On noticing the same, the hearing of the Appeals was accorded priority and was taken up almost day-to-day for hearing. The parties were heard *in extenso*. The Appeals are being decided by this CAV Judgment.

Appellants-plaintiffs' Suits

3. In the Suits of the appellants-plaintiffs for specific performance, the suit property which was subject matter of agreement to sell between the parties was Survey No.354/1 admeasuring 1 Acre and 31 Gunthas situated at Village Manjalpur, District-Vadodara, subsequently forming part of Town Planning Scheme No.19 and converted into Final Plot No.347. The original owner of the said property was one Naranbhai Ramdas Patel. He with others-respondent Nos.2 to 5 herein- executed agreement to sell dated 11th March, 1996 in favour of respondent Nos. 6 to 9-original defendant Nos.6 to 9, which was a registered document. Defendant Nos.6 to 9 thereafter entered into another agreement dated 14th September, 1987 in favour of the appellants herein. Four different agreements in respect of total land divided into four portions were entered into. The appellants-plaintiffs claim that they were the assignees of the right under the said agreement dated 14th September, 1987, and were entitled to seek specific performance of contract in their capacity of assignees and representatives-in-interest. The two agreements of 1986 and 1987 are referred to in their details hereinafter.

3.1 The Suits were instituted against all the defendants Nos.2 to 9. It was the case of the plaintiffs that defendant Nos. 2 to 5 had an registered agreement to sell entered into in 1986 as above with defendant Nos.6 to 9 for sale of the suit property; the consideration fixed was Rs.6.50 per sq.

ft.; that defendant Nos.6 to 9 paid Rs.1,54,251/- towards the Banakhat to defendant NOS.2 to 5 and his deceased father Naranbhai Ramdas. It was pleaded further that thereafter, defendant Nos.6 to 9 by executing the registered agreement on 14th September, 1987, assigned their rights derived under 1986 agreement, in favour of the plaintiffs. The plaintiffs paid the earnest money of Rs.5,000/- to defendant Nos.6 to 9 in each case. It was further averred that on the basis of the rights flowing from agreement dated 11th March, 1986 and in view of subsequent agreement dated 14th September, 1987, it was agreed that the sale deed was to be executed within the stipulated time of two months.

3.1.1 The plaintiffs further averred that the procedure was undertaken at their expense for obtaining the development permission and lay out plan for the suit land, and deceased Naranbhai Ramdas Patel had signed the applications, etc. It was averred that the plaintiffs were ready and willing to proceed and act in accordance with the conditions of agreement to sell. They further stated that the possession of the suit land was also given to them, a *Bhoomi Pujan* on the land for floating Housing scheme in the name of 'Unnati Park' was done and members in the scheme were also registered. It was stated that after the agreement of 1986, the Town Planning Scheme had become final and in view of steep hike in the real estate prices, the defendants had harboured ill-intention and were not co-operating in the various procedures and in executing the sale deed. The plaintiffs stated that

the balance consideration of Rs.1,74,186.28ps were required to be paid and they were ready and willing to pay the said amount and to perform their part of contract and get the deed of sale deed executed. The plaint was subsequently amended with reference to the connected proceedings.

3.1.2 The appellants-plaintiffs of Civil Suit No.659 of 1988 and 660 of 1988 are the real brothers, whereas plaintiff of Civil Suit No.657 of 1988 is brother-in-law of the plaintiff of Civil Suit Nos.659 and 660 of 1988. The plaintiff of Special Civil Suit No.658 of 1988 is brother-in-law of father of the plaintiff of Civil Suit Nos.659 and 660. All the Suits were instituted on 21st November, 1988.

Stand in Written Statements in Appellants Suits

3.2 in the said suits of the appellants, written statement by defendant Nos.2 to 5 was filed on 29th February, 1989, whereas by defendant Nos.6 to 9 the written statement was filed on 21st April, 1989. In the interregnum, event of filing Special Civil Suit No.194 of 1988 by defendant Nos.6 to 9 against defendant Nos.2 to 5 took place, which is mentioned hereinafter. The late filing of written statement in the instant suits, the date of filing written statement in the suit of defendant Nos.6 to 9 mentioned hereinbelow and the stand taken by and conduct of the defendants at the different point of time bear relevance and has to be kept in mind.

3.2.1 The written statement filed on 29th February,

1989 by original defendant Nos.2 to 5 in Special Civil Suit No.657 of 1988 may be noticed. Therein, after general denial to the suit averments, the said defendants proceeded to specifically deny execution of registered agreement to sell dated 11th March, 1986 in favour of defendant Nos.6 to 9 and denied to have received any amount pursuant to said agreement. In other words, defendant Nos.2 to 5 disowned the very transaction which was registered agreement to sell dated 11th March, 1986. They thereafter denied the facts about execution of registered sale deed dated 14th September, 1987 as well as the payments made subsequent thereto as well. They further denied the case of the plaintiffs about sanctioning of development permission and lay out plans from the Corporation, about having given possession to the plaintiffs, about *Bhoomi Poojan* and about permission to the plaintiffs etc. They stated that all those facts were false and conveniently created. The averments about payment of amount towards consideration, about the Town Planning Scheme becoming final afterwards etc. were denied. It was then contended that they (defendant Nos.2 to 5) had never agreed to sell the land to the plaintiffs and the agreements whatever made were without their consent and therefore not binding. They contended that as defendant Nos.6 to 9 had not become lawful owners of the land till date, they were not entitled to execute any agreement, and that prayer for specific performance was required to be granted.

3.2.2 Defendant Nos.6 to 9 filed their written

statement on 21st April, 1989. These defendants accepted the factum of execution of agreement to sell dated 11th March, 1986 by defendant Nos.2 to 5 in their favour and further admitted that they had in turn further contracted with the plaintiffs under subsequent agreement to sell dated 14th September, 1987. It was stated that since defendant Nos.1 to 5 were avoiding and refusing to execute document of sale in their favour or in favour of the persons suggested by them as agreed in the original agreement to sell dated 11th March, 1986, they were required to institute Special Civil Suit No.194 of 1988 for specific performance and got interim stay in the said suit. However as the advocate of defendant Nos.1 to 5 had a talk of settlement pursuant to which the Court had given adjournment, but on the next date due to mistake of Clerk of their advocate, application for extension of stay was not given, and the stay was not extended. Defendant Nos.6 to 9 stated that their suit for specific performance was pending and upon its outcome, they would execute sale deed in favour of the plaintiffs. They stated that before the office of Registrar they had registered *lis pendence* also.

Agreement of 1986

3.3 The agreement to sell dated 11th March, 1986 (Exh.498) was between (i) Patel Dineshbhai Mohanbhai; (ii) Patel Devendrabhai Mohanbhai; (iii) Patel Rajeshbhai and (iv) Patel Dahyabhai Kuberbhai (defendant Nos.6 to 9) on one hand and (1) Patel Naranbhai Ramdas; (2) Patel Ranchhodbhai Narandas; (3)

Patel Chandrakant Narandas; (4) Patel Rameshbhai Naranbhai and (5) Patel Kanubhai Naranbhai (Nos.(2) to (5) being defendant Nos.2 to 5). By this agreement, original defendant Nos.2 to 5 agreed to sell the suit land at a price of Rs.6.50 Ps. per square feet. The land was part of Town Planning Scheme No.19. The parties agreed that the purchasers would be entitled to have the possession of the Final Plot after finalization of the Town Planning Scheme; they would be liable to bear betterment charges as may be payable and would be entitled to earn compensation under the Scheme. By way of earnest money Rs.01,54,251/- was paid to defendant Nos.2 to 5. The final document of sale was to be executed within three months after finalization of the Town Planning Scheme in question and on receiving the possession of the Final Petition Plot. It was provided that if within the said time limit the sale deed was not executed, the agreement to sell would stand cancelled and the earnest money would not be returned. Other conditions included were that the vendees-purchasers would be responsible for levelling the land, etc. The vendors-defendant Nos.2 to 5 agreed that they would cooperate in getting the necessary permissions and doing the procedure as may be necessary in receipt of the land and the title thereof.

3.3.1 It was a condition expressly stated in the said agreement dated 11th March, 1986 (Exh.498) whereunder the vendors agreed that they would execute the final sale deed in the name of vendees-defendant Nos.6 to 9-or in the name suggested by them either in

respect of whole of the land or in part, and further that the expenses in that regard would have to be born by the purchasers.

Agreement of 1987

3.4 Defendant Nos.6 to 9 who had acquired rights to purchase the suit land under the aforesaid agreement, in turn entered into an agreement dated 14th September, 1987 (Exh.488) in favour of the appellants herein. It was recited in the said agreement of 1987 that the original owners Naranbhai Ramdas Patel, Devendra Naranbhai Patel, Chandrakant Naranbhai Patel, Rameshbhai Naranbhai Patel and Kanubhai Naranbhai Patel had executed earlier an agreement to sell (Exh.498) in favour of defendant Nos.6 to 9. Defendant Nos.6 to 9 agreed to transfer all the rights derived by them under the said 1986 agreement in their favour, to the appellants-plaintiffs. Amount of Rs.05,000/- (Rupees Five Thousand Only) paid towards earnest money was mentioned and receipted. The consideration fixed in the said 1987 agreement was Rs.13/- per sq. ft. The land was subjected to different agreements, came to be divided into parcels and four similar agreements in the identical manner were executed in favour of four plaintiffs.

3.4.1 It was stated in the said subsequent agreement (Exh.488) that the agreement to sell dated 11th March, 1986 was enforceable and the rights flowing therefrom were alive and further that under the instant agreement, that is of 1987, those rights were being assigned to the appellants-plaintiffs. The other

conditions in the said agreement (Exh.488) were thus agreed in the previous agreement (Exh.498) which included that levelling of land would have to be undertaken by the proposed purchasers-appellants herein, that expenses for getting permissions under the Land Ceiling Act and other procedures required to be at the expenses of the purchasers-appellants herein and about cancellation of agreement and forfeiture of earnest money if sale deed as agreed was not executed. It was further agreed that during the period until the sale deed was executed, the appellants-the proposed purchasers-would be entitled to put up a housing scheme, to give advertisement in that regard and register members in the Scheme. It was provided that N.A. Permission would be the responsibility of the proposed purchasers-appellants. The other conditions about obtaining title clearance certificate and about the possession from the Municipal Corporation on finalisation of the Town Planning Scheme and further about determining the amounts payable at that time, were agreed.

Events After 1987 Agreement

3.5 It was the case of the appellants-plaintiffs that the original owners were aware and had consented in the execution of subsequent agreement in favour of the appellants herein; and that deceased Naranbhai participated and co-operated in applying for permission to construct and getting lay-out plans sanctioned.

3.5.1 At this stage what followed after agreement

dated 11th September, 1987 may be mentioned with relevance. On 07th October, 1987, the appellants-plaintiffs published advertisement in the local daily Gujarat Samachar announcing the plotting of housing construction scheme in the name of Unnati Park Apartments (Exh.508). A *Raja Chitthi* (construction permission or development permission) dated 25th November, 1987 in relation to the subject matter land for construction of in all 44 tenements came to be granted by the Vadodara Municipal Corporation. Noticeably, the said development permission (Exh.507) was upon application of Naranbhai Ramdas Patel. The appellants herein paid the development fees, the receipts of payment were on record (Exh.496 and 497). It is the case that after plotting the land and obtaining development permission, a *Bhoomi Pujan* ceremony at the site was organized. At the said event, all the defendants were present. It was the case that original owner Naranbhai Ramdas was participating in all these and was present on the occasion. The photographs in that regard relied on by the appellants (Exh.654 to 657).

Special Civil Suit by Defendant Nos.6 to 9

3.6 It appeared that the parties having travelled so far, disputes arose amongst them. Defendant Nos.6 to 9-the purchasers in the agreement to sell dated 11th March, 1986, instituted their suit for specific performance against heirs of deceased Patel Naranbhai Ramdas-defendant Nos.2 to 5, on 04th April, 1988 being Special Civil Suit No.194 of 1988.

The plaintiffs of the said suit pleaded that the defendants were obliged to execute sale deed under the agreement to sell dated 11th March, 1986, that subsequent to earnest money amount Rs.01,54,251/- paid to the defendants, they had further paid Rs.52,000/- as the details given about payment by cheque and by cash in paragraph 3 of the plaint, making total amount Rs.02,06,251/- paid towards the consideration. The plaintiffs stated that though they were willing to pay the balance consideration, due to hike in real estate prices, the defendants had harboured ill-intentions and that they were in process of transferring and alienating the property to others. After giving notice dated 11th March, 1988 they were compelled to file the suit, it was stated.

3.6.1 The written statement filed by the defendants (defendant Nos.2 to 5 herein) of the aforesaid Special Civil Suit was produced on record on 18th April, 1988 (Exh.13), in which the said defendants denied to have executed the agreement to sell dated 11th March, 1986 or to have received the amount. They stated that in any case the so-called agreement to sell dated 11th March, 1986 was cancelled by them. They took a defence that as per the correct facts, earlier an agreement to sell dated 10th September, 1981 was executed with one Mohanbhai Kuberbhai, being the father of plaintiff No.1 and brother of plaintiff No.4, in which initially the price of the land was agreed at Rs.06.50 Ps.; that for some reason the said *Bana Khat* was required to be cancelled, therefore they (the defendants) executed

another agreement dated 11th March, 1986 in which the price of the land was mentioned Rs.06.50 Ps. It was further stated that this was because it was agreed between the parties that the market price was higher and therefore, the price of the land be fixed at Rs.13/- per Sq. Ft. and the defendants were to sell certain plots to the plaintiffs at that price. It was thus claimed by the defendants that the agreement to sell dated 11th March, 1986 (Exh.498) was made in such background. The agreement to sell dated 10th September, 1981 referred to by the defendants in the written statement never came on record.

3.6.2 During the pendency of the afore-mentioned suit for specific performance by defendant Nos.6 to 9 against defendant Nos.2 to 5 after few months and almost simultaneously, the present appellants instituted their suits in question for specific performance being Special Civil Suit Nos.657 of 1988 to 660 of 1988 on 24th November, 1988 against all the defendants. The proceedings of said suits have culminated into these Appeals. In both the suits above mentioned the Courts granted interim stay below application Exhibit 5 in favour of the respective plaintiffs.

Conduct of the Defendants

3.7 As already noted, the defendant Nos.2 to 5 as well as defendant Nos.6 to 9 filed their written statements taking a particular stand in the suits of the appellants herein as late as on 29th February, 1989 and 21st April, 1989. It was after written

statement filed in Special Civil Suit No.194 of 1988.

3.7.1 Subsequent to aforesaid Special Civil Suit No.194 of 1988 but prior to institution of Special Civil Suit Nos.657 of 1988 to 660 of 1988 of the appellants herein, in respect of the suit land an irrevocable power of attorney dated 11th November, 2001 (Exh.518) in favour of one Dhananjay Vallabhbbhai Patel-a third party-transferring in his favour rights created under agreement to sell dated 11th March, 1986 (Exh.498). The executors of the said power of attorney were, noticeably, all the nine defendants (defendant Nos.2 to 5 as well as defendant Nos.6 to 9). The said document of power of attorney (Exh.518) inter alia recited that one Kantilal Ambalal Patel, who was the real uncle of said Dhananjay, had rights in the property and such rights were relinquished by the makers-all the defendants-of the said power of attorney. This power of attorney was coupled with interest in property.

**Withdrawal Purshish Exh.57
in Special Civil Suit No.194**

3.8 Special Civil Suit No.194 of 1988 remained pending almost for 14 years. So were pending Special Civil Suit Nos.657 of 1988 to 660 of 1988 which were by the present appellants. During that period, a power of attorney dated 11th November, 2001 as mentioned above in favour of one Dhananjay Vallabhbbhai Patel with an agreement to sell in favour of said Kantilal Ambalal Patel, the real uncle of Dhanajnay, came to be executed.

3.8.1 On 26th July, 2002 in the proceedings of Special Civil Suit No.194 of 1988, a withdrawal Purshish (Exh.59) was filed by defendant Nos.1 to 3 (three amongst defendant Nos.6 to 9 here) seeking to withdraw the Suit. The contents of the said purshish Exh.59 were curious to be noticed. It mentioned that in respect of the suit land being revenue Survey No.354/1 at Manjalpur, Vadodara, part of T.P. Scheme No.19, a registered agreement to sell registered at Sr. No.2857 dated 11th March, 1986 (Exh.498) was got executed, but they did not know as to who were the owners of the said land; that the said agreement was entered into through a broker by banking upon him. It was further stated that the owners had not signed Exhibit 498 agreement, nor the original owners had received consideration and that there was a fraud. They stated that since the agreement dated 11th March, 1986 at a later point of time, was found to have been fraudulently executed and therefore it was not capable of being implemented, they were not able to raise any contentions with regard thereto, and consequently the suit was not required to be continued, it was stated in the Purshish.

3.8.2 The said withdrawal Purshish was endorsed to with no objection by advocate of respondents. The Court placed it for hearing. In the meantime, on 11th August, 2003 Rameshbhai Naranbhai Patel-defendant No.4 in Special Civil Suit No.657 of 1988 gave a Purshish (Exh.239), declaring that the power of attorney dated 11th November, 2001 given to Dhananjay Vallabhbbhai

Patel and Kantilal Ambalal Patel was cancelled and for that notice in the local daily Sandesh was given on 03rd June, 2003 which was published on 06th June, 2003 (Exh.). Said Rameshbhai-defendant No.4-by this Purshish appointed his advocate producing Vakalatnama.

Connected Orders

3.9 The present appellants filed an application Exhibit 57 seeking to be joined as plaintiffs in the suit in wake of the above-mentioned withdrawal Purshish filed by the original plaintiffs in the suit (defendant Nos.6 to 9). The said application Exh.57 as well as Purshish below Exhibit 59 came to be decided by common order dated 20th September, 2002. The trial court refused to record the withdrawal and rejected Purshish Exh.59. The application Exhibit 57 was allowed and it was ordered that the third party applicants-appellants herein be impleaded as plaintiffs in Special Civil Suit No.194 of 1988.

3.9.1 Against the said order of not allowing the withdrawal, three of the defendant Nos.6 to 9 named Patel Dineshbhai Mohanbhai, Patel Devendrabhai Mohanbhai and Patel Rajeshbhai Mohanbhai, who had signed Exhibit 59 Purshish dated 26th July, 2002 for withdrawal, filed Civil Revision Application No.1103 of 2002 and 1104 of 2002 on 10th September, 2002 before this High Court through their power of attorney holder aforesaid Dhananjay Vallabhbhai Patel.

3.9.2 The said Revision Applications came to be allowed on 23rd/24th September, 2004 as per the

judgment in **Patel Dineshbhai Mohanbhai Vs Naranbhai Ramdas through Legal Heirs [2005 (1) GLR 116]**. The said judgment was carried before the Supreme Court by filing Special Leave Petition. The observations made by this High Court in its judgment in the said Civil Revision Applications as well as the clarification made by the Apex Court while dismissing the Special Leave Petition have pertinence to and bearing on this controversy. They are mentioned and treated in this judgment at the later stage in the succeeding paragraphs.

Sub-proceedings in the Suit

3.10 It is also worth-while to briefly mention incidental applications and proceedings. On 09th July, 2009, the plaintiffs filed an application (Exh.523) to confirm the signature of deceased Naranbhai Ramdas Patel in the application made by him in the Development Application Permission and the Plans sanctioned for the construction scheme on the land and to given exhibits to the said documents. By order dated 13th July, 2009, those documents were exhibited. At Exhibit 524, an application was made by the plaintiffs for accepting the documents produced by them. Another application of the same date (Exh.525) was given by the plaintiffs asking defendant Nos.2 to 5 to reply on oath the queries raised by them. The trial court passed order dated 15th July, 2009 rejecting the said application with observation that the questions asked by the plaintiffs were answered elsewhere and that they would follow the evidence on

record. At Exhibit 575, the plaintiffs gave list of 10 witnesses to examine them.

3.10.1 There were other applications such as Exhibit 744/A, Exhibit 325, Exhibit 757 for joining the heirs. Application dated 31st October, 2010 (Exh.799) was filed for production of Notice of change of possession by defendant Nos.2 to 5 issued by Municipal Corporation. Defendant No.5 filed affidavits (Exh.810 and 811).

**Certain Admissions by Defendant Nos.2 to 5
in their Purshish (Ex.579)**

3.11 Original defendant Nos.2 to 5 in response to the aforesaid application at Exhibit 575, filed a Purshish (Exh.579) declaring and admitting certain facts. The contents of the said Purshish may be noted in brief as it inform the factual aspects having bearing on the findings arrived at herein. Firstly, it was admitted in the Purshish by defendant Nos.2 to 5 that deceased father Naranbhai Ramdas had filled-in Form dated 12th August, 1976 under the Urban Land Ceiling Act and the order was passed by the competent authority on 10th February, 1986 and that they had no objection to exhibit the same (Exh.475). They accepted about the RTS Appeal and the order dated 30th December, 1989 and that the said Appeal was filed by Dineshbhai Mohanbhai Patel and others. Secondly, to be noted with relevance, defendant Nos.2 to 5 further admitted that application dated 25th September, 1987 for getting Development Permission was made under signature of deceased Naranbhai. They stated that this fact was

admitted in their pleadings elsewhere also.

3.11.1 They further accepted the factum of application in the name of deceased Naranbhai Ramdas and about the fees paid for that. Defendant Nos.2 to 5 stated that they had no objection for production of all such applications and other applications which may have been made and the correspondence which may have been entered into, on record. They accepted that the Development Permission was given upon application of deceased Naranbhai Ramdas. It was further admitted that same advocate one Bharat Patel appeared in the Land Ceiling proceedings being Case No.2025 of 1985, on behalf of Naranbhai, in RTS Appeal No.70 of 1989 filed by Dineshbhai Mohanbhai and others, in the proceedings of Special Civil Suit No.194 of 1988 on behalf of Dineshbhai and the co-plaintiffs as well as in Revision Application No.1103 of 2002 which was by their power of attorney said Dhananjay Patel. Said Bharatbhai Patel, advocate, deposed at Exhibit 692.

3.12 The trial court framed issues at Exhibit 409 in the first suit and identical issues in rest of the suits. Both the Courts accepted and held that the agreement to sell dated 11th March, 1986 as well as agreement to sell dated 14th September, 1987 were executed and that both were registered agreements. The first appellate court further reasoned that defendant Nos.6 to 9 had not shown their readiness and willingness to pay the full consideration. Therefore, no right to seek specific performance had accrued. The first appellate court further positively found that

defendant Nos.6 to 9 had assigned their rights in favour of plaintiffs which they had acquired from the original owners of the land. It was held by the first appellate court, however, that after withdrawal of Special Civil Suit No.194 of 1988 defendant Nos.6 to 9 had no right, title or interest in the land and therefore, question of assignment did not arise. It ultimately upheld the dismissal of the suit dismissing the appeal, culminating into the present Second Appeals.

Submissions of Appellants

4. Learned advocate Mr.Mehul S. Shah with learned advocate Mr.Sheetal Patel submitted that under the agreement dated 14th September, 1987, the appellants became assignees; it was an assignment of rights by defendant Nos.6 to 9 validly made in favour of present appellants. He submitted that the agreement of 1986 in favour of defendant Nos.6 to 9 contained a clear term that assignment was under obligation to execute the sale deed as may be required by the vendees and even in respect of parts of the subject matter land. He submitted that even otherwise the rights under the contract were assignable in view of Section 15(b) of the Specific Relief Act, 1963 and they could have been assigned in absence of a stipulation in that regard. It was submitted that for the assignment of rights done under subsequent agreement in favour of the appellants by defendant Nos.6 to 9, there was a consent of the original owners. In that regard, learned advocate for the

appellants highlighted that the original owners were aware about the agreement of 1987, the application and lay-out plans, etc. for the proposed scheme on the suit land were in the name of the original owners for which expenses were incurred by the appellants; they had knowledge. He also relied on the aspect of handing over of possession of the land, *Bhoomi Pujan* conducted and evidence on record on those counts. Learned advocate for the appellants further submitted that the conduct of the defendants from the chain or circumstances and emphasizing with reference to execution of agreement to sell creating interest in favour of third party. He also assailed the reasoning of the judgment of the first appellate court on various counts.

4.1 He also submitted that the courts below ought to have decided the question of breach of injunction. According to him case under Order 39 Rule 2(A) was made out inasmuch as despite the injunction operating, the defendants entered into transaction with the third party creating interest in the property.

4.1.1 Learned advocate relied on the following judgments-(i) **Habiba Khatoon Vs Ubaidul Huq and others [AIR 1997 SC 3236 (1)]** (para 12); (ii) **T.M. Balakrishna Mudaliar Vs Satyanarayana Rao and others [AIR 1993 SC 2449 (1)]** (para 10); (iii) **Shyam Singh Vs Daryao Singh (dead) b L.Rs. and others [AIR 2004 SC 348]**-to buttress his submission that the appellants were assignees of contract and were entitled to get

the decree of specific performance in view of Section 15(b) of the Specific Relief Act. He pressed into service the principle in decision in **Laxman Tatyaba Kankate and another Vs Smt.Taramati Harishchandra Dhatrak [AIR 2010 SC 3025]** that in a suit for specific performance, plea that there has been a considerable increase in the price of suit land, even if true, cannot be a ground to deny specific performance. It was submitted that for judging the readiness and willingness to perform actual tendering of money is not necessary. Therefore, the reasoning of the Court below on the aspect of readiness and willingness and in interpreting Section 16(c) of the Specific Relief Act to hold against the appellants was erroneous in law. For furthering his contention about breach of injunction under Order 39 Rule 2A, he relied on **Patel Rajnikant Dhulabhai and another Vs Patel Chandrakant Dhulabhai and others [(2008) 14 SCC 561]**.

Contentions of Respondents

4.2 On the other hand, learned senior counsel Mr.Percy Kavina with learned advocate Ms.Manisha Narsinghani raised following contentions-(i) agreement to sell dated 14th September, 1987 was an independent contract and could not have been connected with the previous agreement to sell dated 11th March, 1986; (ii) The subsequent contract was a new contract. The two, according to his submissions, could not have been linked in any way and that the subsequent agreement was an individual agreement in itself; (iii) Therefore, agreement of 1987 could not be construed as

an assignment of rights and no rights of defendant Nos.6 to 9 available from the previous agreement could have been said to have been assigned by virtue of the said subsequent agreement; (iv) If at all the agreement of 1987 amounted to assignment, it created assignment of obligation also which was not permissible in eye of law; (v) The previous agreement of sale dated 11th March, 1986 had not created any right in property for defendant Nos.6 to 9. They could not have therefore transmitted their rights derived thereunder. Since right in property was not created, assignment was not permissible in eye of law; (vi) Therefore there was no contract between the appellants and other side, hence there was no right for the appellants to seek specific performance of contract; (vii) There was no privity of contract; (viii) For all these reasons, the appellants could not be said to be assignees or representatives-in-interest entitled to file the suit for specific performance; (ix) The plaintiffs did not plead the agreement of 1986 for claiming prayers for specific performance; (x) The pleadings in the plaint did not meet the essential requirements in a suit for specific performance. There was no expression of readiness and willingness and therefore, dismissal of the suit and non-passing of decree for specific performance by the courts below was proper.

4.2.1 Learned senior counsel in support of his contentions referred hereinabove, referred to and relied upon the following decisions (i) **Indu Kakkar Vs Haryana State Industrial Development Corporation**

Limited [(1999) 2 SCC 37] to contend that absolute interest must be created by the transfer in favour of transferee. Decision in **Suraj Lamp and Industries Private Limited Vs State of Haryana and another [(2012) 1 SCC 656]** was relied on, on the scope and effect of the sale agreement. Learned senior counsel for the respondents also relied on decision in **Citi Bank N.A. Vs Standard Chartered Bank and others [(2004) 1 SCC 12]**. He next pressed into service **Rambhau Namdeo Gajre Vs Narayan Bapuji Dhotra (D) by L.Rs. [AIR 2004 SC 4342(1)]**.

5. Before proceeding to address and discuss the substantial questions of law, deducing the material facts and circumstances available from the above discussion of facts and evidence on record which have bearing on the controversy, they are

(i) in the written statement filed in the year 1989 by defendant Nos.6 to 9 in the appellants' suits where they stated that agreement to sell dated 11th March, 1986 (Exh.498) was alive and subsisting, that for specific performance thereof, they had filed Special Civil Suit No.194 of 1988 and upon its favourable outcome they would execute document of sale in favour of the appellants herein;

(ii) it was accepted by defendant Nos.6 to 9 in their written statement that an agreement to sell dated 14th September, 1987 executed by them assigning their rights flowing from agreement to sell dated 11th March, 1986;

(iii) when Special Civil Suit No.194 of 1988 was sought to be withdrawn after 14 years by Purshish (Exh.579) filed in 2002, only three of the defendant Nos.6 to 9 signed it;

(iv) the contents of the Purshish by defendant Nos.6 to 9 (Exh.57) seeking to withdraw were noticeable as mentioned hereinabove;

(v) statements and admissions by defendant Nos.2 to 5 in Purshish (Exh.579) referred to above showed knowledge and concurrence of their to subsequent agreement of 1987 in favour of appellants;

(vi) agreement of 1987 was acted upon at least in part. There was a participation therein by defendant Nos.2 to 5;

(vii) the circumstance of executing power of attorney dated 11th November, 2001, the respective stand taken in their written statement in the Civil Suits concerned, endorsing Purshish (Exh.579) for withdrawal of the suit with no objection, the act of giving public notice by one of the defendant Nos.6 to 9 and his filing Purshish (Exh.239) engaging advocate, etc., smacked inter-se dealings between the defendants, if not collusion amongst them.

(viii) the agreement to sell of 1981 referred to by defendant Nos.2 to 5 in their reply/written statement in Special Civil Suit No.194 of 1988 never came on record;

(ix) a power of attorney dated 11th November, 2001 came to be executed by all the defendants during the pendency of Special Civil Suit No.194 of 1988 aforesaid in favour of one Dhananjay Vallabhbhai Patel. The said power of attorney was given by all the defendant Nos.2 to 9 jointly. It was not a simple power of attorney but one creating interest in favour of one Kantilal Ambalal Patel who happened to be real uncle of said Dhananjay Patel. It was stated in the power of attorney that an agreement to sell was executed in the year 1998 in favour of said Kantilal.

"Representatives-in-interest"

6. Section 15 of the Specific Relief Act provides as to who may obtain specific performance. Various sub-clauses thereof are the categories of persons entitled to seek specific performance. The relevant part there of is reproduced hereunder:

"(a) any party therefo;

(b) the representative in interest, or the principal, of any party thereto;

Provided that where the learning skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract unless such party has already performed his part of the contract of the performance thereof by his representative-in-interest, or his principal, has been accepted by the other party.

(c) ...

to

(h) ..."

6.1 In the Contract Act, Section 37 speaks of obligations of the party to the contract. It says that parties to the contract must either perform or offer to perform their respective promises unless such performance is dispensed with under the Act or any other law. It also provides that promises bind the representatives of the promisor in case of death of such promisors before performance unless a contrary intention appears from the contract. Below the Section the illustrations are given explaining how the representatives are bound. Section 40 provides that if the nature of contract is such that it evinces intention of the parties that any promise contained therein should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it. Section 41 is about the effect of accepting performance from third person.

6.2 From the reading and language of Section 15 of the Specific Relief Act, 1963, which is practically identically with the language of Section 63 of the Specific Relief Act, the proposition of law which clearly emerges is that unless there is a contract to the contrary either in express terms or implied, to the effect that the interest under the contract shall

not be assigned or that representative-in-interest would not be entitled to seek specific performance of the contract, it is the general rule that otherwise the rights of the parties are both assignable and heritable. Specific performance of the contract may be obtained by representatives-in-interest. The Proviso to sub-clause (b) mentions the excepted categories that where the contract involves application of personal expertise of a party, such contract would not be assignable. Where the learning, skill, solvency or any personal quality of such person is material ingredient in the contract, the contract is not assignable. The contract is also not enforceable by representative-in-interest if the contract itself so provides. It is a principle well settled that all contracts are ordinarily assignable unless there is an intention otherwise, express or implied, and the contracts of the special class mentioned in the Section.

Rule of Assignability of Contract

7. Therefore the settled principle is that all contracts are assignable unless they have ingredient of personal performance. It cannot book any dispute that agreement to sell of 1986 (Exh.498) was assignable.

7.1 In **Munnuswami Naydu [AIR 1926 Madras 699]** it was held that a right under an executory contract to exercise an option at a certain future date to obtain a reconveyance of immovable property at a certain price is assignable. It was laid down that

under Section 54 of the Transfer of Property Act, an agreement to sell, by itself, cannot create any interest in land; muchless can an option even if it is made irrevocable by reason of a contract. It was observed that there was no reason why the interest under the contract is not assignable as a right *ex contractu* if not as a right in *rem*. The Madras High Court in **T.M. Doraiswami Vs Kanniappa Reddi [AIR 1972 Madras 460]** and in **Sinnakaruppa Gounder Vs M. Karuppu Swami Gounder [AIR 1965 Madras 506]** highlighted the principle that a contract is enforceable by or against legal representatives of the parties thereto. In **Sinnakaruppa (supra)**, the contract creating assignment of auction to repurchase reserved to vendor was held to be enforceable by assignee in absence of contract to contrary. It was held that the burden of proving the contrary was on the party who pleads it. The Assam decision in **Bipin Behari Vs Masrab Ali [AIR 1961 Assam 173]** stated the same principle to hold that mention of vendor's name and names of his heirs only in the contract did not amount to prohibition on assignment.

7.2 The Apex Court in **Ram Baran Prasad Vs Ram Mohit Hazra [AIR 1967 SC 744]** propounded the proposition of law that normally, a contract, expressed or implied, in absence of a contrary intention, is enforceable by and against parties thereto and their legal heirs and legal representatives including assignees and transferees. In that case the pre-emption clause in the award of partition did not state whether it was binding on

assignees of successors-in-interest. The Supreme Court held having regard to the context and the circumstances in which partition award was made, that the pre-emption clause was not merely a personal covenant but was a covenant binding of assignees of successors-in-interest of original contracting parties.

7.3 Stating that prima-facie the rights of the parties to a contract are assignable, the Court upon considering the combined effect of Section 23(b) and 27(b) of the Specific Relief Act, 1877 as well as Sections 37 to 40 of the Indian Contract Act, it held that the said statutory provisions in substance lay down that certain exceptions, a contract in absence of a contrary intention express or implied will be enforceable by and against the parties and their legal heirs and legal representatives including the assignees and transferees. It held that prior to the enactment of Transfer of Property Act, the position prevalent in India was that the agreement for sale created an interest in land itself in favour of the purchaser. But there has been change in legal position and Section 54 of the Transfer of Property Act states that contract for sale of immovable property does not itself create any interest in or charge on such property. It was held that by virtue of Section 40 of the Act, the prepositions were established that a contract for sale does not create any interest in the land but is annexed to the ownership of the land. Secondly, the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a

transferee for value with notice.

Assignees Included

8. Following the Apex Court decision in **Ram Baran Prasad (supra)**, Calcutta High Court in **Ramanand Agarwalla Vs Richardson Hugli Holding Limited [AIR 1979 Calcutta 335]**, enunciated the correct position of law as under:

"It is clear from clauses (a) and (b) of S.15 that specific performance of a contract may be obtained not only by any party thereto but also by the representative-in-interest or the principal of any party thereto unless any personal quality of such party is a material ingredient in the contract or the contract prohibits assignment of the same. It, therefore, follows that the right to obtain specific performance of contract is a heritable right and the legal representatives of any party to such a contract can avail themselves of that right. The right is, therefore, not a personal right and the suit for specific performance of contract is not action personalis. On the death of the plaintiff in a suit for specific performance of contract his heirs and legal representatives can be substituted in his place inasmuch as the right to sue survives by virtue of S.15 of the Specific Relief Act. Prima facie, the applicants are entitled to be substituted in place of the deceased sole appellant."

8.1 The assignment of contract is permissible and the assignees of contract stand included in the phrase "representative-in-interest" under and for the purpose of Section 15(b). The Madras High Court in **Nochat Kizhakke Madathil Venketeswara Aiyer Vs Kallor Illath Raman Nambudhri and others [AIR 1970 Madras 358]** held that all assignments not covered by the

Transfer of Property Act are not necessarily invalid. All contracts capable of specific performance are assignable, accepting those of the class prohibited. holding with reference to Section 23 of the Specific Relief Act, 1877 (corresponding to Section 15(b) of 1963 Act) observed that although the words used are "representative-in-interest" the subsequent use of verb "assign" in the Section points conclusively to an assignee being covered by the words "representative-in-interest".

8.2 In **T.M. Balkrishna Mudliar Vs N. Satyanarayana Rao [AIR 1993 SC 2449]** after construing the contract giving right to repurchase, held that such right given was no personal right, was assignable and the assignee was entitled to enforce the contract by instituting suit for specific performance and that the assignee would fall within the meaning of representative-in-interest as contemplated under Clause (b) of Section 15.

8.3 In **Habiba Khatun (supra)**, relied on by learned advocate for the appellant, reiterating the principle and holding after interpreting the terms of the agreement before it, that it was not conferring personal right of reconveyance and the assignment of right to repurchase by son of the original vendor to the stranger plaintiff was valid, observed as under:

"In this connection, we have also to keep in view Section 23(b) of the Specific Relief Act, 1877 which is analogous to Section 15(b) of the Specific Relief Act, 1963. It lays down that except as otherwise provided, the specific

performance of a contract may be obtained by representative-in-interest or the principal, of any party thereto. Thus normally any interest in contract could be assigned to any representative-in-interest who also can enforce the specific performance of the contract against the contracting party. However, if the terms of contract, expressly or by necessary implication, prohibited the beneficiary from transferring his contractual interest to third parties, then only such an assignee cannot sue for specific performance."

Appellants are assignees and "Representatives-in-Interest"

9. On the conjoint reading and construction of two agreements dated 11th March, 1986 and subsequent agreement dated 14th September, 1987, it was clear that the proposed purchasers of the first agreement to sell- defendant Nos.6 to 9-transferred all material rights derived by them from defendant Nos. 2 to 5, in favour of the appellants herein for purchasing of the land in question. All the basic rights flowing from the agreement of 1986 were assigned by virtue of the subsequent agreement. Amongst other conditions, as noted above, an express stipulation was there in the first agreement which permitted assignment of rights. Under that condition, the vendors had agreed to execute the sale deed in favour of the vendors as suggested by the vendors either for the entire land or in its parcels.

9.1 The agreement of 1986 was live for implementation between the parties. There was an explicit reference of the previous agreement of 1986 and in the agreement of 1987 about it was in terms stated that

the rights of the previous agreement were being assigned in favour of the appellant-the vendees in the subsequent agreement. Therefore, the right to purchase the subject matter land which were the essence and substance of fundamental contract arising from 1986 agreement, came to be transferred in favour of the present appellants. The other terms and stipulations of the original contract remained the same and were incorporated in the subsequent agreement. Certain further terms of supplementary nature were also agreed upon. Both the agreement of sell created the wholesome transaction and created rights and obligations between the parties wherein the appellants were clothed with the assignments of rights, as above. The agreement satisfied the essential requirements of valid contract. They also satisfied the concept of mutuality. Agreement dated 14th September, 1987 was a valid and legal assignment whereunder the appellants became assignee and stood covered under the concept and meaning of "representatives-in interest" within section 15 (b) of the Specific Relief Act read with the aforementioned relevant provisions of the Contract Act. They became entitled to seek Specific Performance in their such capacity having been stepped into shoes of original defendant Nos.6 to 9 vis-a-vis original owners of the property-defendant Nos.2 to 5.

9.2 On facts, the contention on behalf of the respondents that subsequent agreement of 1987 was a novation was not well founded. The first agreement to sell of 1986 was alive and was not rescinded between the parties. The Town Planning Scheme after finalisa-

tion of which the sale deed was agreed to be executed became final on 17th October, 1988. Both the agreements were interactive and had a definite linkage in terms of rights and obligations amongst the parties. They constituted a transaction as a whole making the appellants as "representatives-in-interest" to become entitled to seek specific performance. The rights and obligations of the parties arising out from the first contract were continuing. It could not be said that there was a substitution of altogether a new contract in the agreement of 1987 independent of the first contract. The basic principle behind the concept of novation is the substitution of contract by a new one. In **H.R. Basavraj Vs Canara Bank [(2010) 12 SCC 458]** the Supreme Court observed to state that the principle that if the rights under the old contract were kept alive even after the second agreement and rights under the first agreement had not been rescinded, then there is no substitution of contract and, hence, no novation.

9.3 All the material rights under the agreement of 1986 came to be assigned in agreement of 1987. The supplementary condition did not change the nature of basic contract. On facts there was no gainsaying that both the agreements were interconnected and interwoven. The rights and obligations of the parties emanated from the transaction taken as a whole.

Consent and Knowledge of Original Owner

10. Even if the agreement of 1987 is to be viewed to be incorporating conditions additional to

the previous agreement, there was a clear knowledge and consent, if not expressed, certainly implied, of defendant Nos.2 to 5 was discernible from the facts and evidence on record.

10.1 The evidence on record and the attendant circumstances demonstrated thereby did suggest that even otherwise, agreement to sell dated 14th September, 1987 and transmission of rights thereunder were within know of the original owner. The evidence of the plaintiff-Balkrushna Madhusudan Patel (Exh.567) that before agreement of 1987 executed by defendant Nos.6 to 9 in favour of the appellants, meetings were arranged with original owner-Naranbhai Ramdas-which was through defendant Nos.6 to 9 and in that meeting, all the plaintiffs and Dineshbhai and Devendrabhai participated. Such meetings were held 5 to 6 times. The original owner agreed to cooperate in securing necessary permission from the competent authority in respect of the land. Since it was a condition in agreement of 1987 obliging the original owner to execute the sale deed as per the requirement of the vendees, no separate writing was executed, deposed the plaintiff. He stated that it was the responsibility of defendant Nos.6 to 9 to accord to the appellants all other rights agreed by them in the agreement to sell/document of assignment dated 14th September, 1987. The say of the plaintiffs about holding of meetings with the original owner as above, etc., could not be rebutted by the other side. On the contrary, there were corroborative facts and circumstances revealed from the evidence. The application for development

permission was at the instance of original owner-Naranbhai Ramdas. In the plans sanctioned also, his signature was there. In the *Bhoomi Pujan* ceremony, original owner's presence was sought to be demonstrated by producing photographs on record and other material. From the photographs, presence of original owner was identified. On the basis of all these it was possible to dependably infer that the construction scheme on the land in question in the name of Unnati Park was plotted with knowledge of the original owner.

10.2 Above all, in the Purshish filed by defendant Nos.2 to 5 (Exh.579) and in the deposition of defendant No.4-Rameshbhai Naranbhai Patel (Exh.79) facts were admitted that application for Development Permission was made by and under the signature of original owner. The deponent of Exhibit 579 also identified the signature. From the record and evidence therefore there were adequate material aspects and circumstances which established the participation and knowledge of original owner both at pre-1987 agreement stage as well as post agreement. It was plaintiffs' case that after inaugural ceremony of construction scheme in which everybody participated, hoardings and advertisements were put up at the site were grounded by defendant Nos.2 to 5. The dispute arose subsequently gave rise to the litigation.

10.3 The trial court observed that all the six witnesses examined on the side of the plaintiffs identified Naranbhai Ramdas-original owner-present in the photographs showing inauguration of Unnati Park

scheme. It also accepted that on the application as well as plan sanctioned there was signature of said Naranbhai. The first appellate court recorded as under in dealing with the contention in that regard. "With context of said facts, looking to Ex-497-Vadodara Municipal Corporation (VMC) Fee Receipt, Ex-507-Permission of Construction given by VMC, Ex-508 - Unnati Park Advertisement, Ex-509 - Form No.B of VMC, Ex-511 - Site Map of disputed land, Ex-593 - Fee Receipt, Ex-673 - Unnati Park Site Plan approved by VMC, Ex-674 to Ex-680 which are regarding obtaining permissions, etc. from the authorities, it transpires that all these documents are on the name of original owner of the land. Impliedly it becomes clear that original owner has given his consent by way of signing some of these documents regarding development of land and organizing Unnati Park Housing Scheme."

Nature of "Interest" of Representatives-in-Interest

11. The contention of the side of the respondents was that the agreement to sell dated 11th March, 1986 did not create an interest in property, therefore the assignment of rights thereunder was not permissible. This contention is based on the misconception of the nature of right which an agreement to sell creates. The principles stated in the decision in **Ram Baran Prasad (supra)** answer the contentions. It was inter alia highlighted that in English law a contract for purchase of real property is regarded as creating an equitable interest and the absence of time limit in respect of covenant for

exercise an option of right to re-purchase would offend the rule of perpetuity, which was also the position of law prevalent in India before passing of the Transfer of Property Act and at that time, the agreement created had an effect of creating interest in the land itself in favour of the purchaser in the lines of English principles of law. However, a change is brought out in legal position in India since the passing of the Transfer of the Property Act. Section 54 of the Transfer of Property Act provides that sale of immovable property does not, of itself create any interest in such property.

11.1 In **Bai Dosabai Vs Mathuradas Vinoddas [AIR 1980 1334]** reiterated the principle that the concept and creation of duality of ownership, legal and equitable, is alien in Indian law and such a contract in India creates an obligation annexed to the ownership of immovable property, not in nature of interest in the property. The Supreme Court in **Bai Dosabai (supra)** stated the principle as under.

"The ultimate paragraph of Section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 of the Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus the equitable ownership in property recognized by equity in England is translated into India law as an obligation annexed to the ownership of

property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee."

(para 6)

11.2 The decision of Gauhati High Court in **Prabir Kumar Das Vs Amulya Bhushan Paul [AIR 2005 Gauhati 128]** relying on the decisions in **Ram Baran Prasad (supra)**, **Bai Dosabai (supra)** and **Shyam Singh (supra)** enunciated the law in detail to hold that a contract for sale of immovable property which creates an obligation annexed to ownership of property, which is an obligation specifically enforceable. It held in the context of Section 15(b) of the Transfer of Property Act that such right is transferable and assignable. A person who is not party to a contract for sale can demand specific performance of contract if he is an assignee of promise provided under the contract.

11.3 Therefore, the "nature of interest" referable to the concept of "representative of interest" under Section 15(b) of the Specific Relief Act is not "interest in property". Nor it is a charge created in the property. The interest which a representatives-in-interest inherits is contractual interest. The nature of this interest is an obligation annexed to the ownership of the property, and not interest in the property, to be stated at the cost of repetition. Both the concepts of interest namely "interest annexed to the ownership of the property" and the "interest in property" are different legal concepts. It can also not be said that agreement to sell gives a mere right to sue.

11.4 In **Prabir Kumar (supra)** laying down correct principle of law, it was observed and held that contract of sale in favour of the purchaser is not a mere right to sue transferred. It is more than that. The Court observed referring to Section 40 of the Transfer of Property Act,

"While considering the question as to whether a contract for sale of immovable property is assignable or whether such a contract for sale of immovable property gives to the purchaser a mere right to sue or something more than a mere right to sue, one has also to bear in mind the provisions of Section 40 of the TP Act, which run as follows:-

"40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently or any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or Where as third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands."

(Para 15)

11.4.1 It then stated,

"A careful reading of what Section 40 embodies shows that while a contract for sale does not create any interest in, or charge on, the land,

it nevertheless creates an obligation annexed to the ownership of the property and this obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value, but with notice. Section 40, thus, undoubtedly, makes a substantial departure from the English law, for, while the contract for sale creates, in India, no equitable interest in the land, it, at the same time, cast an obligation annexed to the ownership of the land making the contract enforceable not only against the vendor but also against an assignee of the vendor, who takes from the promisor the property gratuitously or takes the property for value, but with notice of the contract for sale. A contract for sale, thus, in India, does not stand on the same footing as a mere personal contract, for, it can be enforced against an assignee with notice. This position of law becomes abundantly clear from the observations made in Ram Baran Prasad (AIR 1967 SC 744) (supra), which runs as under:-

(Parar 11)

"The second paragraph of S. 40 taken with the illustration establishes two propositions: (1) that a contract for sale does not create any interest in the land, but is annexed to the ownership of the land and (2) that the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value but with notice." (Para 16)

11.5 The ratio in **Rambhau Namdeo Gajre (supra)** relied on by the respondents has to be viewed in the context of the aforesaid principles, the question considered by the Supreme Court in that case was "Whether the doctrine of part performance could be availed of by the defendant with whom the respondent had never entered into an agreement of sale?" Admitted case of the parties that the plaintiff/respondent entered into

an agreement of sale with one Pishorrilal on 16th June, 1961 who took possession of the suit land in part performance thereof. The sale deed was not executed or registered in his favour. Pishorrilal did not take any steps for getting the agreement of sell specifically enforced, but he within two-and-half-months executed a similar agreement of sale dated 01st September, 1961 in favour of the appellant and put him in possession of the suit land. It was held that the doctrine of part performance enshrined in Section 53-A of the Transfer of Property Act could not have been availed by Pishorrilal against the plaintiff/respondent. This decision was in the context of applicability of Section 53-A which held that protection of the said Section is available as a shield only against transferor. The facts of this case does not go hand-in-hand with the facts of the said case.

Absence of Privity cannot be pleaded

12. Also misconceived was the contention of learned counsel for the respondent that there was no privity of contract. The privity is a derivative kind of interest founded on or arising out of a contract. It is conceived jurisprudentially as a relationship which creates legal obligations. Therefore, the privity existed between the parties and was recognised statutorily in terms of Section 15(c), which entitles representative-in-interest to obtain specific performance.

12.1 In **Gulam Mahammad Vs Lakha Singh [AIR 1935 Lahore 181]**, one Gulam Mahammad having purchased the

property from auction sale deposited part of the earnest money in the government treasury. He had no means of pay the balance amount of the purchase price which was to be paid in the installments, and he entered into an agreement with one Diwan Singh to sale the property. Diwan Singh undertook to pay the remainder amount and was put in possession. Diwan Singh paid some of the installments and in the midst, entered into a further agreement with one Lakha Singh to sale the land to him on consideration of Lakha Singh paying the total amount. Suit for specific performance was filed by Lakha Singh against Gulam Mahammad, wherein the latter took the plea that there was no privity of contract between him and the plaintiff. The Court rejected the plea and held that the plaintiff was representative-in-interest of Diwan Singh and clearly had a *locus standi* to maintain the suit. The fact of the above case is akin to one on hand, and the principle applies.

12.2 In **Pannalal and another Vs Ramnarayan and another [AIR 1971 Rajasthan 294]**, the Rajasthan High Court while reiterating the principle about assignability of contract and enforcement thereof by the assignees, it held that absence of privity of contract with the assignee could not be a ground. In that case the facts were that one Ramnarayan-defendant No.1-entered into agreement with the plaintiff for sale of his house. This house has already been sold by defendant No.1 to Sheo Sahai defendant No.2 on 03rd December, 1957, with the condition of reconveying the house by Sheo Sahai within a period of six years on payment of

Rs.6000/- by Ramnarayan on the basis of a subsequent agreement dated 03rd March, 1958. It was further stipulated between the plaintiffs and Ramnarayan in the subsequent agreement dated 02nd June, 1961, that Sheo Sahai would either join as a vendor in the deed of sale to be executed in favour of the plaintiffs or that Ramnarayan would first get the property transferred to himself from Sheo Sahai and then would transfer it to the plaintiffs under a registered sale-deed before 31st July, 1961. It was also agreed that the vendors and the vendee shall bear the expenses for the stamps and registration of the sale-deed in equal proportion. The Court observed thus,

"Here too, though there is no privity of contract between the appellant and Sheo Sahai but as the appellants are the representative-in-interest of Ramnarayan in whose favoru Sheo Sahai had made an agreement to reconvey the property within six years on the receipt of Rs.6000/-, they can enforce the contract for sale. Before instituting the suit, they also gave a notice to Sheo Sahai expressing their preparedness to pay him Rs.6000/- on behalf of Ramnarayan and calling upon him to join in executing the sale-deed with him. But he by his reply Ex. 9 declined to do so and challenged the plaintiffs' right to claim specific performance of the contract against him. Thus I am of the view that the appellants were entitled to enforce specific performance of the contract both against Ramnarayan and Sheo Sahai."

(Para 17)

12.3 Dealing with the decisions relied on by learned counsel for the respondents, in **Indu Kakkar (supra)**, the facts were that an industrial site was allotted in favour of private person Haryana State

Industrial Development Corporation and the instrument of allotment contained a condition that allottee shall construct building and complete the erection and installation of machinery within prescribed time, failing which the plot shall be liable to be resumed back by the Corporation. The allottee failed to fulfill the condition, the plot was resumed by the Corporation, and the allottee filed Civil Suit for declaration that order of resumption was illegal. During the pendency of the suit the allottee assigned rights to the petitioner in that case by a registered sale deed. It was held that the Conveyance Deed in favour of the original allottee had not created absolute interest. The facts of the present case are not comparable and operate in different compass and context. Similarly, in **Waheed Beg (supra)** suit was filed for specific performance for sale of house which was a property not owned by defendant No.1 but belonged to Labour Department which had allotted to defendant No.1 on lease-cum-sale basis, and it was held that the defendant had no alienable right in the property. Again the said application is not applicable. Decision in **Suraj Lamp (supra)** was in the context of provisions of the Transfer of Property Act wherefrom learned counsel wanted to explain the scope and concept of an agreement to sell.

Special Civil Suit No.192 of 1988 and Survival of Appellants' Right to seek Specific Performance

13. This takes to consideration of question Nos.2 and 3 as to whether the events of withdrawal of Special Civil Suit No.194 of 1988 and the events and

litigations between the parties ensued thereafter as mentioned above, the prayers in the suits of the appellants herein with regard to seeking specific performance of the contract. The common order dated 22nd September, 2002 below Exhibit 57 and Exhibit 59 applications passed in Special Civil Suit No.194 of 1988, whereby the trial court did not allow the plaintiffs of that suit-defendant Nos.6 to 9 by dismissing Exhibit 59 application, and allowing application (Exh.57) permitting the appellants herein-third third parties there-to be impleaded as plaintiffs, was challenged before this Court by filing Civil Revision Application No.1103 of 2002 and 1104 of 2002. In the said judgment in **Patel Dineshbhai Mohanbhai Vs Naranbhai Ramdas (decd) through Legal Heirs [2005 (1) GLR 116]**, this Court held that the trial court could not have refused the prayer of the plaintiff for unconditional withdrawal of the suit and it was further held that since the withdrawal of the suit was to be permissible, the third party applicants, who were not the parties in the suit originally, could not have been allowed to become co-plaintiffs.

13.1 One of the contentions of the other side in the said Revision Application was that the plaintiffs had made certain admissions in the suit, about which the Court observed that merely because plaintiffs had made admissions, that by itself could not be made basis for refusing the withdrawal of the suit, if the plaintiffs wanted to withdraw the suit unconditionally. Learned advocate for the revisionist-defendant Nos.6 to 9 had submitted that the plaintiffs were not

relying upon the averments made in the Purshish for withdrawal of the suit (Exh.59) and it was acceded to that Exhibit 59 Purshish may be treated as simple Purshish for unconditional withdrawal of the suit.

13.2 On a careful reading of the aforesaid decision in **Patel Dineshbhai Mohanbhai (supra)**, it has to be accepted that the Court was alive to the aspect of the case that the third party applicants who had applied at Exhibit 57 to become co-plaintiffs-the appellants herein, had already instituted their independent suit for specific performance and in that suit the plaintiffs of Special Civil Suit No.194 of 1988 and the defendant Naranbhai through heirs were parties.

Clarification by this Court and Apex Court

14. The following observations in **Patel Dineshbhai Mohanbhai (supra)** may be pertinently noted.

"Mr.A.J. patel has also relied upon the decision in the case of *Satish Mohan Bindal v. State of U.P.*, reported in AIR 1986 All. 126 to substantiate his say that admission in pleading, by themselves can be made foundation of rights of the parties. The said judgment was cited in order to substantiate his say that if the original petitioner is permitted to withdraw the suit unconditionally, it will wipe out the admissions made in the present suit."

(para 38)

"At this stage, Mr. B.S. Patel, has submitted that the plaintiffs are not relying upon any averments made in the *pursis* and averments made in thee *pursis* may not be taken into consideration, withdrawal may be treated as un-

conditional withdrawal. In that view of the matter, even if any averment is made in the *pursis*, those averments will have no application in any manner and the applicant-third party can continue their suits and they can rely even upon the so-called admissions made by the plaintiffs in the suit in question. Of course, question regarding admissions made by the plaintiffs, which are helpful to the third party-applicants, is required to be considered by the Court before whom suits are pending."

(para 39)

(emphasised here)

14.1 The Court observed in paragraph 49 *inter alia* that the applicant-third party can rely upon admissions of the plaintiff as per the provisions of the Evidence Act, in the suits filed by them, which are pending. It was further clarified in paragraph 50 that if the respondent Nos.2 to 5 (the third party applicants) have any independent right, naturally they can pursue the same in the suits which they have already filed. This Court also made it clear in the below quoted observations that withdrawal of the suit would not prejudice in any way the rights of the third party applicants, by observing and clarifying,

"So, far as argument of Mr. A.J. Patel regarding Sec. 15(b) of the Specific Relief Act is concerned, which provides that the specific performance of the contract should be obtained by the representative in interest of the principal of any party thereto, the said aspect can be highlighted by the applicants in the suits, which they have already filed and which are pending. **The question whether there is any assignment in favour of the applicants, is a question which is required to be decided in the suits filed by them and withdrawal of the present would not in any way prejudice the rights of the third party-applicants and the**

suits filed by the third party-applicants are required to be decided on their own merits and the applicants can raise all the points available to them in those suits." (para 51)
(emphasised here)

14.2 Against the above judgment, Special Leave Petitions were filed by the third party applicants-appellants herein, which came to be dismissed by the Apex Court on 16th November, 2004 as per the following order passed.

"The Special Leave Petition is dismissed.

We make it clear that the dismissal of these Special Leave Petitions does not preclude the petitioners to pursue other remedies that are available in law."

14.3 From the above facts and the observations and clarifications made by this Court as noted above as well as further endorsement thereof by the Supreme Court observing to make it clear that the dismissal of Special Leave Petitions would not amount to preclusion for the appellants herein in pursuing the other remedies, it is significantly clear that rights of the appellants to seek specific performance and the related prayers are salvaged by virtue of observations in **Patel Dineshbhai Mohanbhai Vs Naranbhai Ramdas (decd) through heirs [2005 (1) GLR 116]** and the clarification made by the Supreme Court as above. The Civil Suits instituted by the appellants herein for specific performance were pending and the above clarification was in that context only.

14.4 It appears that the appellants had filed ap-

plication below Exhibit 174 in their Special Civil Suit No.658 of 1988, which was on the ground that the withdrawal of Special Civil Suit No.194 of 1988 filed by defendant Nos.6 to 9 was through fraud, misrepresentation and concoction and it was prayed that the said withdrawal should be set aside. Learned trial Judge dismissed the said application below Exhibit 174 by order dated 24th January, 2008. The said order came to be challenged before this Court by way of Special Civil Application No.4976 of 2008. This Court dismissed the said petition, however it was clarified by this Court in paragraph 10 that, "above order and the observations made hereinabove are for deciding this petition on the basis of averments made, and the pending suit of the petitioners and issues arising therein shall be decided by the learned Judge on the evidence that may be brought before him."

15. This clarification further made in the order in Special Civil Application above were on the same lines as the clarification made by the Apex Court noted above, it necessarily follows that the right of the appellants-original plaintiffs to seek prayers pleaded in their respective present suits does survive even after withdrawal of Special Civil Suit No.194 of 1988 and also after dismissal of Special Civil Application No.4976 of 2008.

16. As far as the aspect of breach of injunction under Order 39 Rule 2-A is concerned, the first appellate court recorded that though the defendants had created interest in the property during the currency

of the interim order, the same was revoked by defendants themselves by way of revoking Exhibit 829 and Exhibit 830. Therefore the defendants acted to undo the wrong done. In the circumstances, the first appellate court further observed that in the case of the case it was not proper case for taking any action under Order 39 Rule 2-A and endorsed to the findings of the trial court in that regard. The findings of the Courts below on this aspect are not required to be interfered with in the second appellate jurisdiction. It could not be said that it was a perverse finding. The question framed on the said aspect is accordingly answered.

Pleadings in the Complaint

17. The Civil Suit was instituted against all the parties, that is the proposed purchasers of agreement to sell dated 11th March, 1986, as well as original owner. On an attentive reading and consideration of the averments in the complaint, the contention of the learned counsel for the respondent that pleadings did not make out a prayer for specific performance, could not be countenanced. In first paragraph of the complaint, they averred about registered agreement to sell dated 11th March, 1986 between the original owner and defendant Nos.6 to 9 and mentioned the consideration and the payment made by defendant Nos.6 to 9. The factum of subsequent agreement of 1987 entered into by defendant Nos.6 to 9 in their favour was also averred and pleaded. They pleaded that they were ready and willing to undertake the procedure of obtaining necessary permission as per the conditions of agreement to

sell. They further averred that rights under the agreement to sell dated 11th March, 1986 came to be transferred and assigned to them by way of subsequent agreement. The trial court rightly recording the pleadings in the plaint observed that the plaintiffs averred that total measurement of the property was fixed at 5,417 Sq. Meters by Deputy Collector under the ULC Act after considering full holding of the land as on 10th February, 1986 by deceased Naranbhai Ramdas. The plaintiffs thereafter averred about rate of Rs.13/- per Sq. Meters and the amount required to pay accordingly and that they were ready and willing to pay. The plaintiffs further averred that they would pay Rs.01,75,585/- being the remaining amount in Special Civil Suit No.657 of 1988, Rs.01,74,186.80 Ps. being balance amount payable in Special Civil Suit No.658 of 1988, Rs.01,75,585.04 in Special Civil Suit No.659 of 1988 and Rs.02,00,203.96 Ps. being balance amount payable in Special Civil Suit No.660 of 1988 at the time of execution of the sale deed. Thus there were clear averments regarding readiness and willingness to pay the balance amount of consideration.

17.1 Thus there was a specific averment in paragraph 5 of the plaint that plaintiffs were ready and willing to pay the balance amount of consideration and were ready and willing to perform their part of contract. The essential averments regarding readiness and willingness was thus made in the plaint by the plaintiffs. They expressed their willingness to abide by the conditions.

17.2 Learned advocate for the respondents was justified in contending that in order to satisfy requirement under Section 16(c) of the Specific Relief Act, actual tendering of money is not necessary. When there was a specific averment in the plaint about readiness and willingness, it could not be said that requirement necessary to seek specific performance was not fulfilled. The prayer was for specific performance of the agreement to sell mentioned in the plaint. Therefore, the prayer was for specific performance of the agreement to sell mentioned in the plaint. The prayer was thus properly made. A simultaneous prayer was made for declaration that agreement to sell dated 11th March, 1986 was alive for implementation. Thus the pleadings in the suit of the plaintiffs made out the prayer for specific performance. The requirement of pleadings in the suit for specific performance was met with. Adequate details were pleaded.

Conclusions

18. In light of the above facts emerging and the position of law arising, the following are the main conclusions:

(i) The appellants herein are assignees and "representatives-in-interest" within the meaning of Section 15-B of the Specific Relief Act, 1963. Therefore, they are entitled to seek specific performance of contract;

(ii) Rights of the appellants arise from agreement to sell dated 14th September, 1987 (Exh.488)

read with agreement to sell dated 11th March, 1986 (Exh.498);

(iii) Agreement to sell dated 11th March, 1986 (Exh.498) executed by original defendant Nos.1 to 5 in favour of original defendant Nos.6 to 9 remained alive, and the rights derived therefrom upon original defendant Nos.6 to 9 came to be assigned by subsequent agreement (Exh.498) with the appellants, in favour of the appellants;

(iv) The appellants-plaintiffs were entitled to continue their respective Special Civil Suits for decree of specific performance even after withdrawal of Special Civil Suit No.194 of 1988 and also after dismissal of Special Civil Application No.4976 of 2008. Prayer for specific performance pleaded in the suits survived;

(v) The pleadings and evidence made out a case for granting prayers for specific performance.

19. As a result of above discussion and conclusions, judgment and order dated 02nd April, 2013 of learned 7th Additional District Judge, Vadodara in Regular Civil Appeal Nos.14 to 17 of 2012 confirming the judgment and order dated 30th December, 2011 passed in Special Civil Suit Nos.657 to 660 of 1988 are hereby set aside and the suit prayer in paragraph 13(1) is allowed directing the respondents herein-original defendants to execute sale deed in favour of the appellants giving effect to the transaction amongst themselves by specifically performing the

contract of sale and handing over possession of the subject matter property, upon the appellants paying the balance amount of sale consideration.

Registry shall send back the Record and Proceedings.

(N.V.ANJARIA, J.)

FURTHER ORDER

At the time of pronouncement of judgment, since in order dated 27th June, 2013 passed in Civil Application Nos.5045 to 5048 of 2013, while passing interim order in the Appeals, appellants were directed to deposit amounts equivalent to five times more amount than the amount of consideration involved in each of the four Appeals. Pursuant to the said direction, amount was deposited by the appellants with the Registry of this Court as per the following details:

Amount (Rs.)	Date	Receipt No.
08,95,931.40	21 st June, 2013	292/2013-2014
09,02,925.20	24 th June, 2013	296/2013-2014
09,98,743.20	24 th June, 2013	297/2013-2014
09,00,000.00	24 th June, 2013	298/2013-2014
01,26,019.80	24 th June, 2013	299/2013-2014

Learned advocate for the appellants, on instructions of the appellants, stated with regard to the aforesaid amount deposited that the appellants are ready and willing to allow the entire amount to be considered as additional amount in respect of relief granted so as to balance the equities between the

parties.

It is directed that the amount deposited as per the aforesaid judgment with the Registry of this Court, shall be transmitted by the Registry to the Court concerned expeditiously.

At this stage, learned advocate Ms.Manisha Narsinghani for the respondents requests the Court to stay the judgment for three months so as to enable the respondents to approach higher forum. She stated that record being bulky, long time would be required.

In response to this request of learned advocate for the respondents, learned advocate for the appellants makes a statement that upto 10th October, 2014 the appellants will not take any steps with regard to execution pursuant to this judgment.

In view of said judgment, request as made by learned advocate for the respondents is not entertained.

(N.V.ANJARIA, J.)

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