

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**BENCH AT AURANGABAD****APPEAL FROM ORDER NO.77 OF 2014
WITH
CIVIL APPLICATION NO.8934 OF 2014**

Sk. Farooque s/o Sk. Mohammed,
Age-49 years, Occu:Business,
R/o-Post Office Road, Bhokardan,
Tq-Bhokardan, Dist-Jalna.

...APPELLANT
(Ori. Plaintiff)

VERSUS

- 1) Ahmed Khan s/o Sherkhan,
Age-70 years, Occu:Business,
R/o-Near Ganpati Bank, Bus Stand
Road, Bhokardan, Tq-Bhokardan,
Dist-Jalna,
- 2) Altaf Hussain s/o Mohd. Hanif,
Age-29 years, Occu:Business,
R/o-Chaus Colony, Bhokardan,
Tq-Bhokardan, Dist-Jalna,

...RESPONDENTS
(Ori. Defendants)

...

Mr. Sohail E. Siddiqui Advocate for Appellant.
Mr. M.S. Chaudhari Advocate for Respondent
No.1.
Mr. M.A. Jahagirdar Advocate for Respondent
No.2.

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CORAM: A.I.S. CHEEMA, J.

DATE OF RESERVING JUDGMENT : 7TH JANUARY, 2015

DATE OF PRONOUNCING JUDGMENT: 19TH JANUARY, 2015

JUDGMENT :

1. This Appeal from Order is filed by original Plaintiff and on admission, has been heard finally with consent of the learned counsel for both sides, on 7th January 2015.

2. The Appellant (hereafter referred as "Plaintiff") has filed Special Civil Suit No.13 of 2014 before Civil Judge, Senior Division, Jalna for specific performance of agreement of sale. The Suit has been brought against Respondent Nos. 1 and 2 (hereafter referred as "Defendant No. 1 and Defendant No.2" respectively).

3. The Case of the Plaintiff in brief, is as under:

(A) According to the Plaintiff, Defendant No.1 (Respondent No.1) executed agreement of sale on 14th May 2013, of the suit house as described in the Plaint for consideration of Rupees Sixty Four Lakhs. On the same day, Defendant No.1 entered into another agreement of sale with Defendant No.2 for purchase of part of land owned by Defendant No.2 for total consideration of Rupees Thirty Five Lakhs. The agreement between Plaintiff and Defendant No.1 made provision that the Plaintiff will pay Rupees Thirty Five Lakhs to Defendant No.2 towards the agreement between Defendants and the amount would be taken as consideration for the agreement between Plaintiff and Defendant No.1. Additionally, Plaintiff paid cash earnest amount of Rupees Four Lakhs to the Defendant No.1.

(B) According to the Plaintiff, on 14th May 2013

itself the legal heirs of Defendant No.1 executed a consent deed also in favour of the Plaintiff. However, the Defendant No.1 on 23rd July 2013 filed complaint to Police Station, Bhokardan that bogus agreement had been brought into existence. Later on, on 19th September 2013 he withdrew the said complaint. Plaintiff issued legal notice to Defendant No.1 to perform his part of contract. According to Plaintiff, Defendant No.1 assured to complete the contract on due date of 10th January 2014. On 14th December 2013 Plaintiff published news item in Lokmat and Lokmat Samachar calling objections to the purchase of the suit property. Defendant No.1 raised objection through Advocate on 27th December 2013 that no such agreement had taken place. Plaintiff met Defendant No.1 but Defendant No.1 asked him to wait till 10th January 2014. On that day Defendant No.1 flatly refused to execute the sale deed and thus the Suit was required to be filed for specific performance.

4. In the Suit, Plaintiff filed application Exhibit 5 for temporary injunction to restrain Defendant No.1 from alienating the suit property till decision of the suit. Defendant No.1 filed reply opposing the Application. Defendant No.2 filed say and written statement supporting the case of Plaintiff. The trial Court, after considering the record and submissions of both sides, dismissed the Application for temporary injunction. Thus, the present Appeal.

5. The Appeal raises grounds that the property is required to be protected till final adjudication and it is necessary to grant temporary injunction. According to the Appellant-Plaintiff if third party rights are created in the suit property, the decree would be frustrated. The trial Court wrongly concluded that agreement of sale might be fabricated. The defence raised, can be considered at the time of final hearing.

6. Defendant No.1 - Respondent No.1 has filed affidavit in reply claiming that the suit property is self acquired property of the Defendant No.1 which he purchased in 1978. It is situated on main road near Bus Stand, which is commercial area. The Defendant No.1 was interested to develop the suit house for commercial purpose with financial assistance from his children but the children refused to contribute and rather his eldest son Hamid Khan started pressurizing the Defendant No.1 to partition the property and sell the same which was not accepted by Defendant No.1. According to this Defendant, his son Hamid entered into criminal conspiracy with the Plaintiff and Defendant No.2, who are close friends, to grab the suit house illegally and purchased three stamp papers on 14th May 2013. This Defendant is claiming that the consent deed is also forged as his wife shown to have signed the consent deed, is illiterate and cannot read and write Marathi and

uses thumb impression, but her signature is shown in Marathi. The signatures of Feroz Khan and Amjad Khan, the other children of Defendant No.1, have been obtained by "giving greed of making payment to them". According to this Defendant, he has other son, namely Zafar Khan and daughter Shabana, who refused to sign such consent letter/deed. The Plaintiff knows that the property cannot be alienated by the legal heirs but to pressurize Defendant No.1, hurdles have been created. According to Defendant No.1, he did not purchase the stamp papers of the alleged agreements of sale and did not sign the said agreements and that the signatures are forged. According to him, he never signs in Marathi but the documents show signature in Marathi. Thus, according to him alleged agreements are forged with criminal intention to grab the suit property illegally. He claims that when he got knowledge of the forged documents, he lodged Police complaint. Plaintiff has influence on local Police and Police suggested to Defendant

No.1 to compromise the matter. On 13th August 2013 Defendant No.1 has filed private complaint having Criminal M.A. NO.224 OF 2013 and the J.M.F.C. has issued directions under Section 156(3) of Code of Criminal Procedure to register F.I.R. The same has been registered as Crime No.2 of 2014 on 28th February 2014 against the Appellant-Plaintiff. In the said crime, Plaintiff, his two brothers and one son of Defendant No.1 have been impleaded as accused. Defendant No.1 claims that relatives and other persons brought pressure on Defendant No.1 and Defendant No.1 gave consent to close the investigation but did not withdraw the allegations made in the complaint. Defendant No.1 claims that he also issued publication in newspaper on 28th December 2013 that there is no agreement between him and the Plaintiff and forged agreement has been prepared. Respondent No.1 - Defendant No.1 wants the Appeal to be dismissed.

7. I have heard learned counsel for both

sides. The Appellant is being supported by Respondent No.2. Counsel for the Appellant and Respondent No.2 submitted that the agreements of sale as have been filed in the trial Court and copies of which are at Exhibit B and C, were executed by Respondent No.1 – Defendant No.1 and the other heirs executed consent deed, copy of which has been filed by Respondent No.1 with affidavit in reply at Exhibit R-1-A. According to the counsel, Respondent No.1-Defendant No.1 was given Rupees Four Lakhs as earnest amount and as per the agreements, Plaintiff paid Rupees Thirty Five Lakhas to Defendant No.2 against the transaction of Plaintiff and Defendant No.1. They submitted that looking to the documents, there was an agreement of sale between the parties and the temporary injunction should have been granted by the trial Court. The submission is that trial court considered that Defendant No.1 signed in English on the reply and the agreements had signature in Marathi and thus the trial Court

doubted the agreements of sale and did not grant relief in favour of the Plaintiff. The learned Advocates referred to Exhibit F filed with the Appeal to say that the Defendant No.1 withdrew the complaint filed before Police and in this withdrawal also, it was mentioned that without asking him, no agreement can be entered. They claim that prima facie case has been made out.

8. Against this, the learned counsel for Respondent No.1 – original Defendant No.1 submitted that the Defendant No.1 is an old person and the property concerned is his self acquired property. He submitted that Hamid, the son of Defendant No.1 colluded with the Plaintiff and Defendant No.2, to handover the photographs of Defendant No.1 and in collusion the two documents of agreements of sale have been brought into existence. When the Defendant No.1 came to know about such forgery, the Defendant No.1 filed the complaint to the Police. However, the relatives

later on brought pressure on Defendant No.1 to withdraw the complaint against his son and because of that the document Exhibit F, filed with the Appeal, was brought about by the Police. He submits that the Police had no business to get such document executed and the same needs to be ignored. The counsel referred to the affidavit in reply filed by Defendant No.1 to point out that Defendant No.1 signs in English whereas the disputed agreements of sale have signatures purporting to be of Defendant No.1, which are in Marathi. The counsel submitted that the signatures are forged. The Plaintiff is an estate dealer and has brought about the documents so that Defendant No.1 cannot enjoy his property in his old age. The counsel argued that Defendant No.1 cannot be restrained from enjoying his property.

9. If the impugned order of the trial Court is perused, the trial Court examined document Exhibit B, the alleged agreement between Plaintiff

and Defendant No.1 and document Exhibit C, the alleged agreement between Defendant Nos. 1 and 2 and the consent deed Exhibit R-1-A, (copy of which is filed by Respondent No.1 in Appeal). Trial Court discussed that one of the witnesses on the two agreements of sale is named as Hamid Khan Ahmed Khan but reading the two agreements with the consent deed, observed that the consent deed also has the same three witnesses and the person No.2 executing the consent deed was shown as "Hamid Khan Ahmed Khan Pathan" and thus found that the person executing the consent deed was different than the "Hamid Khan Ahmed Khan" shown as witness in the agreements of sale. The trial Court considered the reply dated 27th December 2013 sent by Defendant No.1 denying the agreement of sale and explanation published in newspaper Anand Nagari. The trial Court also considered the withdrawal statement dated 19th September 2013 recorded before the Police. Copy of this has been filed as Exhibit F in the Appeal. Referring to

this document, the trial Court rightly observed that what was recorded by the Defendant No.1 was that he did not wish to proceed against his son. If Exhibit F is perused, referring to his earlier complaint, Defendant No.1 claimed that the contents were correct and stated that the Police should take action against the person shown as purchaser but no action should be taken against his son Hamid Khan as his son had been misguided for bringing about the agreement. He claimed that no transaction can be done without his consent. The Police, however, appears to have closed the whole complaint, as can be seen from the notice issued on the same day, copy of which has been filed at page No.30 of the Appeal Memo.

10. The trial Court further considered the fact that the documents filed with Exhibit 25 in the trial Court as well as Criminal Application No.224 of 2013 filed, show that Defendant No.1 signs in English. According to the trial Court,

there was no independent reasonable receipt acknowledging the receipt of Rupees Four Lakhs from the Plaintiff and there was cloud of doubt about the document and that the signatures did not match and for such reasons the trial Court held that the prima facie case was not made out. Trial Court reiterated that for want of proof of exchange of consideration between Plaintiff and Defendant No.1 and Defendant No.2, it did not find that there would be irreparable loss to the Plaintiff.

11. At the time of arguments, I had asked the learned counsel for Appellant-Plaintiff that when Plaintiff claims to be businessman, if he was incurring expenditure for purchase of property, in view of Sub-section (3) of Section 40A of the Income Tax Act, how Rupees Four Lakhs could have been paid as cash towards the earnest amount. The learned counsel submitted that liability under the Income Tax Act would be different. He submitted

that Plaintiff did pay Rupees Four Lakhs as cash towards earnest amount.

12. If the material available is considered, the Plaintiff claims that Rupees Four Lakhs have been paid in cash towards earnest amount. Plaintiff also claims that towards another agreement between the Defendants (Exhibit C) Plaintiff paid Rupees Thirty Five Lakhs to the Defendant No.2. If Exhibit C is perused, the whole consideration of the concerned land was fixed at Rupees Thirty Five Lakhs and if the whole consideration had been paid, the document still purported to be an agreement of sale, for which sale deed was to be executed on 10th January 2014. Although the whole consideration was purported to have been paid under Exhibit C, still the possession of the land continued with Defendant No.2, the seller. This aspect is also worth keeping in mind. The substance is that although Defendant No.1 is shown to have received benefit

under Exhibit C on paper, in actual he does not have anything even from the transaction which is shown under Exhibit C. Even for this purported payment of Rupees Thirty Five Lakhs, there is no other document except Exhibit C. It is surprising that large amounts of Rupees Four Lakhs and Rupees Thirty Five Lakhs are shown to have been paid by the Plaintiff but Plaintiff neither shows any document that he had such amounts nor behaves as a prudent person who as businessman would make such huge payments by either cheque or draft. If really vide Exhibit B, Rupees Four Lakhs have been paid to Defendant No.1, who as per the document Exhibit B, is shown to be in business (but who in Affidavit in reply claims to be having occupation of "Labour" [like his children as in consent deed Exhibit R-1-A]), no document is brought to show where such amount has been put. No documents from any Bank accounts are shown. The trial Court was right in its observations that there was no independent reasonable receipt acknowledging the

receipt of Rupees Four Lakhs. It was right when it observed that proof of exchange of consideration is not available.

13. Defendant No.1 claimed in the trial Court and showed that he signs in English whereas the disputed documents purporting to have his signatures, are in Marathi. The trial Court has considered this aspect also for holding that prima facie case is not made out. I do not find any reason to disagree with the trial Court, at this stage. Respondent No.1 – Defendant No.1 in affidavit in reply is asserting that he has other children also who did not join his son Hamid Khan in what this Defendant alleges to be a conspiracy between Plaintiff and his son Hamid Khan.

14. Defendant No.1 is old person of 70 years of age. The property in dispute appears to be his self acquired property. At such ripe age, only because there are disputed documents like Exhibit

B and C, without there being substantive and reliable proof of actual payment to Defendant No.1, it would not be appropriate to put fetters on the right of Defendant No.1 by passing temporary injunction order. The trial Court rightly came to the conclusion that prima facie case was not made out and that when Plaintiff fails to show proof of exchange of consideration, Plaintiff cannot claim that he would suffer irreparable loss. Naturally, the balance of convenience is not in favour of the Plaintiff.

15. For the above reasons, I do not find any reason to interfere with the impugned order. The Appeal from Order is dismissed.

. Observations made in this Judgment are on the basis of what prima facie appears from record and shall not influence the suit which is yet to be decided.

16. Civil Application No.8934 would not survive and the same stands disposed of, accordingly.

[A.I.S. CHEEMA, J.]

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