IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.150 OF 2015
WITH
CIVIL APPLICATION NO.191 OF 2015

Rajendra Kesharchand Bora ... Appellant
vs.
Dharti Developers and Others ... Respondents

Mr. R.D. Soni i/b. M/s. Ram & Co., for the Appellant.
Mr. M.S. Karnik i/b. Mr. Sachin Gite, for Respondent No. 1.
Mr. G.R. Agrawal, for Respondent No. 3.

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **30th NOVEMBER, 2015**

P.C.:

. This Appeal is directed against the order dated 31st October, 2014 passed by the learned Joint Civil Judge, Senior Division, Nashik below Exhibit "5" in Special Civil Suit No. 360 of 2013 whereby directing Defendant No. 2 who is the Appellant before this Court restraining him temporarily from alienating the suit property and creating third party interest till disposal of the suit.

2. The suit property belong to one Thakur family who mortgaged the property with Nashik Peoples Co-Operative Bank.

However the said loan was not repaid. In between Nashik Peoples Co-Operative Bank was amalgamated with Saraswat Cooperative Bank. Thereafter, Saraswat Cooperative Bank/Mortgagee initiated the proceeding against the said Thakur family i.e. the owner of the suit land wherein Defendant No. 1/Respondent No. 2 was the highest bidder. However, Defendant No. 1 has nominated Defendant No. 3/Respondent No. 3 as his nominee by letter dated 23rd January, 2009 for the sale certificate. The Defendant No. 1 issued letter dated 16th June, 2011 in favour of the Defendant No. 3 declaring as a nominee for the sale certificate and thereafter mortgagee bank issued a sale certificate on 18th November, 2011 in favour of the Defendant No. 3. The Defendant No. 3 subsequently executed a registered sale deed on 10th July, 2012 in favour of Defendant No. 2 who is the Appellant for the amount of Rs. 2.99 Crores. The Defendant No. 1 who is the original highest bidder, on the other hand also entered into unregistered Memorandum of Understanding with the Plaintiff who is Respondent No. 1 in this Appeal from Order on 24th January, 2011 and accepted Rs. 41 lacs from the Plaintiff. However, Defendant No. 1 executed deed of confirmation on 4th February, 2012 with the Plaintiff in respect of the suit land. Thus, the Defendant No. 1 has executed the different agreements with the original Plaintiffs and also with Defendant No. 3 from whom the present Appellant who is Defendant No. 2 has purchased the land.

3. The Appellant/Respondent No. 2 filed a suit for specific performance bearing Suit No. 360 of 2013 against the Respondent No. 3 in which the application for temporary injunction was moved. The said application was allowed and the Appellant/Defendant No. 1 is restrained from alienating the suit property and creating the third party interest till disposal of the suit.

4. The learned counsel for the Appellant has submitted that prior to M.O.U. dated 24th January, 2011 which was entered into by the original Defendant No. 1 with the Plaintiff, the original Defendant No. 1 has executed agreement for sale on 5th January, 2010 with Defendant Nos. 1 and 3 from whom the Defendant No. 2 has purchased the suit land. Thus, the agreement between the Plaintiff and Defendant No. 3 is prior to the M.O.U. which is on the basis of the Plaintiff's claim for specific performance. He submitted that the learned trial Court has considered all the facts and also the

chronology of the events in respect of all the documents of Defendant No. 1 with various parties however, he has erred in appreciating the balance of convenience in favour of the Appellant/ Defendant No. 2 and also holding that *prima facie* the case is established in favour of the Plaintiff. He further submitted that the Appellant is in a possession of the suit premises. The suit premises earlier was an open land with a theater which was demolished by the Appellant. He further submitted that the Appellant are intended to construct a building may be commercial or residential.

5. The learned counsel for Respondent No. 1 while opposing the Appeal from Order has pointed out as per the Memorandum of Understanding dated 24th January, 2011, the Respondent No. 1 has paid Rs. 41 lacs to Defendant No. 1. He submitted that the deed of confirmation also executed in favour of the Plaintiff on 4th February, 2012 i.e. prior to the consent terms which Defendant No. 1 has entered with Defendant No. 3 in Special Civil Suit No. 969 of 2011. Under such circumstances, the Plaintiffs have good case and the property is to be preserved as the Plaintiffs have rightly proved its case. He supported the order passed by the learned Judge.

6. Perused the documents and all the agreements. So also the relevant portions of the agreements relied on by both the parties. *Ex facie* it appears a case of fraud played by Defendant No. 1. The Defendant No. 1 has executed the first agreement with Defendant No. 3 on 5th January, 2010. Thereafter, he executed Memorandum of Understanding on 24th January, 2011 with original Plaintiff i.e. Respondent No. 1 however, in the said agreement, he did not disclose the fact that earlier he has entered into an agreement of sale in January, 2010. The fact of such agreement was within his knowledge alone and he should have disclose it. Prior to that, that he being the highest bidder has nominated Defendant No. 3 for the sale certificate and obviously money of the auction has been paid by Defendant No. 3. The Defendant No. 1 has issued a letter to the bank on 16th June, 2011 that Defendant No. 3 who has been nominated, the sale certificate is to be issued in favour of Defendant No. 3. It is to be noted that five months prior to issuance of this letter i.e. on 14th January, 2011 he has already executed Memorandum of Understanding.

7. It appears that Defendant No. 1 has taken stand that

Defendant No. 3 in whose favour the sale certificate was issued has played a fraud on him because he never intended to give nomination in true respect in favour of Defendant No. 3 but it was some collateral transaction. Therefore, he filed a suit No. 969 of 2011 against Defendant No. 3 and the Saraswat Bank. The said suit was subsequently compromised and the consent terms were filed on 4th May, 2012 by the parties. On perusal of the consent terms, it is found that Defendant No. 1 has specifically mentioned in clause No. 3 that he categorically agreed to sale/transfer/convey all the rights of whatsoever nature including those he received by virtue off the allotment letter received by him from the Saraswat Co-Op. Bank Ltd., as a successful bidder/auction purchaser.

8. In view of this, the consent terms which were filed before the Court and upon accepting those consent terms, the Court has decreed the suit in terms of consent terms, it shows that the Defendant No. 1 had intention to cheat both the parties and he accepted money from both the parties. In view of these facts, it is necessary to balance whether the Plaintiff has a *prima facie* case and whether he is going to suffer irreparable loss or balance of

convenience in his favour. At present the Defendant No. 2 is in a possession of the suit property and he has executed a registered sale deed with Defendant No. 3 and to whom the Defendant No. 1 has promised before the Court by virtue of consent terms that he has given all the rights to Defendant No. 3. It is also seen in the said consent terms, the Defendant No. 1 has acknowledged the transaction between Defendant Nos. 3 and 2 and has consented the same as mentioned in para 6 of the said consent terms. It is also shown that at the time of executing of the consent terms, Defendant No. 1 the original auction purchaser has accepted Rs. 60 lacs from Defendant No. 2. The document consent terms even if made before the Court has its sanctity before the Court and as the possession of the suit land is with Defendant No. 2/Appellant and when the entire amount is paid, he is going to suffer an irreparable loss. The Plaintiffs are not in a possession of the suit land and considering this fact, the Plaintiff have not proved its case.

9. Hence, the injunction granted earlier is vacated. However, in order to assure the monitory claim of the Plaintiffs, the Defendant No. 2 will give the bank guarantee of Rs. 41 lacs within eight weeks.

10. On request of the learned counsel for the Appellant, the earlier order to continue for four weeks.

(MRS.MRIDULA BHATKAR, J.)