

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**APPEAL FROM ORDER NO. 39 OF 2015
WITH
CIVIL APPLICATION NO. 4644 O F 2015
IN AO/39/2015**

Raman Katthu Patel
Age : 56 years, Occ: Agriculture,
R/o. Chaupale,
Taluka and District Nandurbar.

... Appellant
(Original Def.No.2)

Versus

1. Ramu Fakira Patel,
Age: 52 Years, Occ: Service,
R/o. Chaupale,
Taluka and District Nandurbar.
2. Mohan Katthu Patel
Age : 47 years, Occ: Agriculture,
R/o. Village Chaupale,
Taluka and District Nandurbar.

... Respondents
(Resp.No.1 Original Plaintiff and
Resp.No.2 Original Def.No.1)

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Advocate for the appellant : Mr. R. R. Mantri h/f Mr. B. A. Agrawal
Advocate for respondent No.1: Mr. M. G. Kochar
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CORAM : V. K. JADHAV, J.

DATED : 13th APRIL, 2016

ORDER:-

1. By consent of learned counsel for respective parties, heard finally at admission stage.

2. Being aggrieved by the order dated 14.10.2014 passed below Exh.5 in Regular Civil Appeal No.49 of 2014 by Principal District Judge, Nandurbar, original defendant No.2 has preferred this appeal.

3. Brief facts giving rise to the present appeal are as follows :

Respondent No.1/original plaintiff instituted a suit bearing Special Civil Suit No.4 of 2009 for specific performance of contract in respect of landed property against the present appellant and respondent No.2. The trial court, by its judgment and decree dated 27.06.2014, partly decreed the suit and rejected the relief of specific performance of agreement of sale, however, directed defendant No.1 (respondent No.2 herein) to refund the earnest amount of Rs.1,00,000/- to the plaintiff along with interest from the date of institution of said suit till realisation of entire amount within two months from the date of said order. Being aggrieved by the same, respondent No.1/original plaintiff has preferred R.C.A. No. 49 of 2014 before District Court, Nandurbar. Respondent No.1/original plaintiff has filed application Exh.5 in the said appeal for interim injunction to restrain the respondents from disposing of or creating third party interest in the suit property till the decision of the appeal. Learned Principal District Judge, Nandurbar, by impugned order dated 14.10.2014 passed below Exh.5, allowed the application Exh.5 and thereby restrained the respondents from disposing of the suit

property or creating third party interest over it during pendency of the appeal. Being aggrieved by the same, the original defendant No.2 has preferred this appeal.

4. Learned counsel for the appellant submits that respondent No.1/original plaintiff, during pendency of the suit, sought relief of temporary injunction against present respondent No.2/original defendant No.1 only, and after the said application was decided by the trial court, the appellant was impleaded as a party defendant in the suit. Learned counsel submits that for the first time in the appeal, such an interim relief is claimed against the appellant/original defendant No.2, and the lower appellate court has erroneously allowed the said application Exh.5. Learned counsel submits that partition in respect of the suit property has already taken place between the appellant/original defendant No.2 and respondent No.2/original defendant No.1 and the appellant was the owner of the suit property. Learned counsel submits that the plaintiff had knowledge of the alleged partition and therefore, respondent No.1/original plaintiff cannot be a *bona fide* purchaser. Learned counsel submits that after the full fledged trial, learned Judge of the trial court has refused the relief of specific performance of agreement of sale to respondent No.1/original plaintiff. Learned counsel submits that respondent No.1/original plaintiff has failed to establish a *prima*

facie case before the lower appellate court and the balance of convenience does not lie in his favour. Learned counsel submits that the impugned order is thus, liable to be quashed and set aside by allowing the present appeal. The application Exh.5 in R.C.A. No. 49 of 2014 is thus, liable to be rejected. In order to substantiate his submissions, learned counsel for the appellant placed reliance on the decision in the case of ***Kachhi Properties vs. Ganpatrao Shankarrao Kadam and others***, reported in **2010 (5) Bom.C.R. 43**.

5. Learned counsel for the appellant submits that, in case this court confirms the order passed by the lower appellate court, then hearing of the pending appeal may be directed to be expedited.

6. Learned counsel for respondent No.1/original plaintiff submits that the agreement in question was executed on 27.10.2007 and the disputed Mutation Entry No. 1305 is shown to have been sanctioned on 25.06.2007. Learned counsel submits that appellant is the real brother of respondent No.2/original defendant No.1 and the appellant has also signed the said agreement of sale as a witness. Learned counsel submit that there is no evidence to show that the alleged partition was effected between the appellant and respondent No.2/original defendant No.1 prior to the said agreement. Learned counsel submits that the trial court has rejected the relief of specific

performance of agreement of sale mainly on the ground that plaintiff could not prove his readiness and willingness to perform his part of the contract. Learned counsel submits that even though no interim injunction was sought against the present appellant during pendency of the suit, however, subsequently, he was joined as a party defendant to the suit and decree is passed against him also. Learned counsel submits that since respondent No.2/original defendant No.1 has denied the execution of agreement itself, there is reasonable apprehension in the mind of the plaintiff that appellant as well as respondent No.2/original defendant No.1 may create third party interest in respect of the suit property to defeat his claim. Learned counsel submits that considering the same, the lower appellate court has rightly allowed the application Exh.5. Learned counsel submits that there is no substance in the appeal and the appeal is, thus, liable to be dismissed.

7. Admittedly, appellant is the real brother of respondent No.2/original defendant No.1. Learned Judge of the trial court, in paragraph No.26 of the judgment, has observed that if the relief of specific performance is refused, then no question would arise as to the title of defendant No.2. Though the trial court has accepted that defendant No.1 has agreed to sale the suit land for a valuable consideration to the plaintiff and after accepting earnest amount of

Rs.1,00,000/-, executed the agreement of sale dated 27.10.2007, trial court found that plaintiff was not ready and willing to perform his part of the contract, and accordingly refused to grant relief of specific performance of agreement in favour of the plaintiff. Learned Judge of the trial has also recorded finding in the affirmative when the issue arose “whether defendant No.1 has failed to perform his part of the contract”. Furthermore, the trial court has also observed that defendant No.1 failed to prove that the transaction between him and the plaintiff was a money lending transaction and that he has received the amount as loan amount. The lower appellate court is therefore, right in saying that there are some circumstances appearing in the case which *prima facie* indicate execution of an agreement. There is no evidence to show that partition was effected prior to the agreement which is the subject matter of the suit. The trial court has also observed that defendant No.1 has failed to prove readiness and willingness to perform his part of the contract. In view of this, the lower appellate court has rightly observed that the finding of the trial court on the point of readiness and willingness on the part of the plaintiff *ex-facie* appears to be doubtful. No prejudice is likely to be caused to the original defendants if they are restrained from creating any third party interest in respect of the suit property. I do not find any fault in the impugned order passed by the lower appellate court. There is no substance in the appeal and the appeal

is, thus, liable to be dismissed. Hence, I proceed to pass the following order:

O R D E R

- I. The Appeal From Order is hereby dismissed.
- II. Learned Principal District Judge, Nandurbar, is hereby directed to dispose of the pending appeal bearing Regular Civil Appeal No. 49 of 2014 as expeditiously as possible and preferably within a period of six (06) months from today.
- III. In view of dismissal of Appeal From Order, nothing survives in the pending Civil Application and the same stands disposed of.

(V. K. JADHAV, J.)

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