IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.4458 OF 2016
IN
FIRST APPEAL NO.1556 OF 2016
IN
SUIT NO.9693 OF 1989
[HIGH COURT SUIT NO.2872 OF 1989]

Aditya Dharmendra Goyal & Ors. …. Applicants / Org. Plaintiff

V/s.

Niranjanaben Jayantilal Shah @ Jhaveri & Ors. …. Respondents/ Org. Defendant

Mr. Rajiv Narula, i/by M/s. Jhagiani Narula & Associates, for the Appellants-Original Plaintiffs.

Mr. Pankaj Sawant, Sr. Advocate, a/w. Mr. Ali Abbas Delhiwala, a/w. Ms. Tripty Kapadia, and Mr. Kaushal Parsekar, i/by M/s. Joy Legal Consultants, for the Respondent Nos.1 to 4-Original Defendants.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 20TH OCTOBER 2016.

P.C. :

1. This Civil Application is preferred by the original plaintiffs, who are the appellants in this case, for a relief of interim injunction restraining respondent Nos.1 to 4 from creating any third party rights, title or interests in respect of the suit flat No.82 on the 8th floor of Kshitij Building, situate at 47, Napean Sea Road, Mumbai-400 036.

2. It is submitted by learned counsel for the applicants that, pursuant to the negotiations, an Agreement for Sale came to be executed on 29th August 1986; as a result of which, respondent Nos.1 to 4 agreed to sale the suit flat to the applicants for a sum of Rs.28,81,000/-. Out of the said amount of consideration, at the time of negotiations itself, the amount of Rs.1,00,000/- was paid by cheque on 1st March 1986 and an amount of Rs.1,00,000/- was paid by another cheque on 4th April 1986. It is urged that, after execution of the Agreement, a sum of Rs.5,00,000/- was paid by cash on 9th September 1986 and a further sum of Rs.6,50,000/- was paid by cash on 23rd September 1986. Thus, totally, the amount of Rs.13,50,000/- has been paid by the applicants to respondent Nos. 1 to 4 towards consideration of the suit flat. It is urged that a Declaration in Form No.37-EE was also signed by respondent No.1 for himself and on behalf of the other respondents and the same was lodged with respondent No.8- the Income Tax Authority on 26th September 1986. Subsequently, due to certain amendments to the Income Tax Act, 1961, a further declaration in Form No.37-I was required to be filed. However, respondent Nos.1 to 4 failed to sign the said form and the applicants unilaterally filed the said Form 37-I with respondent No.8 on 15th October 1986. It is urged that, thereafter, respondent No.8, on 19th December 1986, had passed an order stating that the suit flat was required to be purchased by the Central

Government in view of the provisions of the Income Tax Act. Respondent Nos.1 to 4 had filed Writ Petition No.9 of 1987 challenging the said order and on 27th January 1987, an order was passed in Writ Petition No.9 of 1987 admitting the said Writ Petition and directing respondent Nos.1 to 4 not to alienate or encumber the suit flat.

3. In this back-drop, the applicants have filed a Suit, bearing No.9693 of 1989, for specific performance of the Agreement for Sale before the Trial Court. The Notice of Motion was taken out in the said Suit. It is urged that, Writ Petition No.9 of 1987 came to be disposed of in view of certain orders passed by the Hon'ble Supreme Court and thereafter the matter was remanded to respondent No.8. Respondent No.8, once again, on 18th February 1993 passed an order for acquisition of the suit flat by the Central Government. Respondent Nos.1 to 4 challenged the said order by filing Writ Petition No.488 of 1993. The said Writ Petition was admitted on 19th April 1993 and a status-quo order was ordered to be maintained. Thereafter, on 5th June 2007, the said Writ Petition No.488 of 1993 came to be adjourned sine-die in view of the pendency of the Suit No.9693 of 1989.

4. It is urged that, in the meanwhile, the Suit filed by the applicants

before the Trial Court came to be dismissed on 30th June 2016. It is urged that, during the pendency of the Suit, the applicants were protected by the order dated 27th January 1987 passed in Writ Petition No.9 of 1987 and, thereafter, by the order dated 19th April 1993 passed in Writ Petition No.488 of 1993. Now, in view of the disposal of Writ Petition No.488 of 1993 by this Court on 22nd September 2016, whereby the said Writ Petition was allowed without prejudice to the rights and contentions of these applicants, it is urged that, it has become necessary to restrain respondent Nos.1 to 4 from creating any third party interests in the suit flat. It is submitted by learned counsel for the applicants that the applicants are having good case on merits. The impugned Judgment and Order of the Trial Court cannot be sustained and after hearing of the First Appeal, it would be quashed and set aside and in such situation, during pendency of the First Appeal, if the rights of the applicants in the suit flat are not protected, the First Appeal itself would become infructuous.

5. This Civil Application is strongly resisted by learned counsel for respondent Nos.1 to 4 by submitting, *inter alia*, that the Trial Court has elaborately, after considering the entire evidence on record, in paragraph No.18 of its Judgment, has rightly held that there is interpolation and overwriting in respect of the amount of consideration, as mentioned in the Agreement for Sale. It was changed from the figure *"Rs.48,81,000/-"* to

“Rs.28,81,000/-”. There was evidence to that effect of an expert, namely, Ms. Swati Vilas Gaikwad, Assistant Chemical Analyzer, Directorate of Forensic Laboratory, Government of Maharashtra, Kalina, Mumbai, who was examined. The Trial Court also found that there is change and interpolation in respect of the date also in the Agreement for Sale and hence it is submitted that, as the Trial Court has held that the applicants have not come before the Court with clean hands, they cannot be entertained to the equitable relief of specific performance of the contract of the agreement. According to learned counsel for respondent Nos.1 to 4, therefore, in view of this clear finding arrived at by the Trial Court, which is based on the evidence, applicants have no case for success in the First Appeal. It is further submitted that as, ultimately, the acquisition of the suit flat by the Central Government is upheld, even if, ultimately, applicants succeed in proving that the consideration was Rs.28,81,000/-, the consideration being far below the market rate, the suit flat will stand acquired by the Central Government. At the most, applicants will become entitled, in such situation, only to the remedies, which they can get if they succeed in the First Appeal. Therefore, during the pendency of the First Appeal, there is absolutely no case made out for injuncting respondent Nos.1 to 4 from creating third party interests in respect of the suit flat.

6. To counter these submissions, learned counsel for the applicants

has pointed out that this being the First Appeal, it is the statutory right of the applicants to challenge the impugned Judgment and Order of the Trial Court and, therefore, during the pendency of the First Appeal, the status-quo, as regards creation of third party rights in respect of the suit flat, which was granted till the decision of the Suit, needs to be maintained. Moreover, learned counsel for the applicants has submitted that the Trial Court, while answering issue No.1, in paragraph No.12 of its Judgment and Order, has categorically held that, *"the defendants are admitting their signature on the Agreement (Exhibit-9). They are also admitting receipt of the earnest money of Rs.13,50,000/-. They are also admitting signature on Form No.37-EE under the Income Tax (Exhibit-12). They have further admitted the signature on the receipt for Rs.5,00,000/- (Exhibit-10) and on the receipt for Rs.6,50,000/- (Exhibit-11)"*.

7. In view thereof, according to learned counsel for the applicants, if respondent Nos.1 to 4 are admitting execution of the Agreement for Sale, the only ground on which the Trial Court has dismissed the applicants' Suit is that there is some interpolation, which, according to the applicants, is a correction in respect of the figure of consideration amount. According to learned counsel for the applicants, the cross-examination of an expert Ms. Swati Vilas Gaikwad, Assistant Chemical Analyzer, Directorate of

Forensic Laboratory, Government of Maharashtra, Kalina, Mumbai, shows that the applicants have tried to specifically confront her to know whether this alleged interpolation or the correction was made subsequently or at the time of execution of the Agreement itself. That question was not allowed, but, if that question still remains open, then, the applicants have good case on merits. Hence, according to him, the status-quo relating to the suit flat needs to be maintained; especially, when the Writ Petition is also decided, subject to the decision of this Suit.

8. It is true that this being the First Appeal, the entire evidence recorded by the Trial Court will be again scanned and on factual aspects also, the case will be scrutinized again. The finding, as recorded by the Trial Court, relating to interpolation, on which relief of specific performance of the agreement was rejected to the applicants, is again subject to scrutiny by this Court in the First Appeal. However, at the same time, it has to be noted that the evidence of an expert Ms. Swati Vilas Gaikwad, Assistant Chemical Analyzer, Directorate of Forensic Laboratory, Government of Maharashtra, Kalina, Mumbai, clearly states that there was alteration, interpolation and overwriting in respect of the amount of consideration mentioned in the Agreement. She has also given the reasons for such opinion in her evidence by stating that, *"on microscopic observation of the contents of the relevant portion in the Agreement for*

Sale (Exhibit-9), she found fiber disturbance and overwriting and tear marks on digits and letters. She also used video spectral comparator 5,000 instrument for viewing the said line and observed remnant of digit '4' deciphered beneath digit '2' of figure question site and also remnant of alphabet 'F' and 'O' deciphered beneath alphabet 'W' and 'E' of the word 'Twenty' of alphabet side on page number '4' of the exhibit". She has further stated that, on her examination, she could easily opined that, "*out of figure '28', figure '2' was changed to figure '4' and, similarly, in the written words, the word 'Twenty' was changed to 'Forty'.*"

9. Learned counsel for respondent Nos.1 to 4 has also produced on record the enlarged photograph, which was produced by the expert before the Trial Court, of the disputed figure and the writing in respect of consideration amount and to the naked eye also, the interpolation can be easily seen.

10. Now, as regards the submission of learned counsel for the applicants that this was a correction made at the time of execution of the Agreement for Sale itself, if it was so, then it was essential and necessary for the applicants to state so in the plaint itself. The applicants should have come before the Court with clean hands by stating in the pleading itself that the necessary change or correction was carried out in the figure

of consideration, both, in the letters and in the words, in the Agreement for Sale (Exhibit-9) at the time of execution of the said Agreement itself and they could have assigned reasons also for such corrections, if it was made at the time of execution of the Agreement.

11. As observed by the Trial Court, the applicants have not done so and, therefore, prima facie, it can be seen that the applicants have not come before the Court with clean hands. If the plea is not taken initially in the plaint itself and is tried to be made out at the time of evidence, after being confronted with the defence that it was interpolated subsequently, then the applicants have to face the consequences for the same, as it follows that such a plea was taken only as an afterthought. Therefore, when the Trial Court has, prima facie, rightly came to the conclusion that the entire Agreement for Sale and the transaction is not free from the clouds of suspicion and applicants have not come before the Court with clean hands and, particularly, as regards the consideration amount, it cannot be said, at this stage also, that the Trial Court has committed any illegality in dismissing the Suit for specific performance, because the relief of specific performance being equitable and discretionary, it can be granted only to the party who comes before the Court with clean hands and having done the equity.

12. As a result, prima facie, it appears that the applicants have no good case as they are trying to make out. Moreover, though the Writ Petition came to be disposed of subject to the decision of the First Appeal, it is clear that the Central Government has acquired the suit flat, it being undervalued. If, ultimately, applicants prove that the consideration amount agreed was only Rs.28,81,000/-, then, as held in the Writ Petition, the said consideration being undervalued, the acquisition of the suit flat will stand. Therefore, ultimately, if the applicants succeed in the Appeal, at the most, they will be entitled to get back the earnest money, which they have paid towards consideration and the damages, but, in these facts of the case, there is absolutely no reason to injunct respondent Nos.1 to 4 from creating third party interests in respect of the suit flat.

13. As a result, this Civil Application for interim injunction stands dismissed.

14. It is made clear that, the observations made here-in-above are only for the purpose of deciding this Civil Application and not for any other purpose.

[DR. SHALINI PHANSALKAR-JOSHI, J.]