

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO.118 OF 2015
WITH
NOTICE OF MOTION (APPEALS) NO.471 OF 2016**

Bhupendra Jethmal Kakka
and others ... Appellants.

Versus

M/s. Nikunj Enterprises
and others ... Respondents.

**WITH
APPEAL NO.182 OF 2015
WITH
NOTICE OF MOTION (APPEALS) NO.462 OF 2016**

Mr. Pradeep Jethmal Kakka
and another ... Appellants.

Versus

M/s. Nikunj Enterprises
and others ... Respondents.

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Mr. Deepak J. Lulia for the Appellants.
Mr. Atul Damale, Senior Counsel i/b. Mr. Hitesh Dabhi for
Respondent Nos.1 to 3.

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***CORAM : Smt. Vasanti A Naik &
Sarang V. Kotwal, JJ.***

DATE : 13th December, 2017.

P.C. :

By these intra court appeals, the appellants-original plaintiffs have appealed against the orders of the learned Single Judge, dated 12.08.2014 in the notice of motion in the two civil suits.

The appellants are the original plaintiffs. Two suits were instituted by the appellants against the respondent-defendant nos. 1 to 3 for specific performance of the agreement for sale of two two-bed room flats. It was pleaded by the appellants in the suit that the MOU was executed between the appellants and the respondent nos. 1 to 3 on 24.02.2009, whereby the defendant nos. 1 to 3 had agreed to sell each flat to the appellants for a consideration of Rs. 65,10,000/-. It is pleaded by the appellants in the suits that almost 92% of the consideration for the said flats was paid by the appellants and only a sum of Rs. 7,10,000/- remain to be paid. It is pleaded that the possession was liable to be handed over to the appellants on 31.03.2012. It is pleaded that the defendant nos. 1 to 3 unauthorizedly sold the flats to the defendant no.4 on ownership basis and therefore after negotiations between the appellants and the defendant nos. 1 to 3, the defendant nos. 1 to 3 agreed to pay a sum of Rs. 1,35,00,000/- to the appellants towards the net value-consideration of the said flats. It is pleaded that after the said oral agreement was entered into, an amount of Rs. 46,48,000/- was returned to the plaintiffs but the remaining amount was not paid despite the assurance by the defendant nos. 1 to 3 to pay the same. It is pleaded that the defendant nos. 1 to 3 had breached their part of the agreement by selling the flats to the defendant no.4. The appellants had

therefore filed the suits for seeking the specific performance of the agreement of sale-MOU, dated 24.02.2009. Certain other ancillary prayers are also made in the suit. In the said suit, the appellants filed the notice of motion praying for the appointment of a receiver for the suit premises viz. the flats and had also sought a direction against the defendant nos. 1 to 3 to produce the balance-sheet for the past three years. A mandatory direction was sought against the defendant nos. 1 to 3 to deposit a sum of Rs. 1,35,00,000/- along with 24% interest. After hearing the parties, the learned Single Judge rejected the prayers made in the notice of motion by the orders dated 12.08.2014.

It is stated on behalf of the appellants that in the circumstances of the case, and on the basis of the material on record, the learned Single Judge ought to have granted the prayers made in the notice of motion. It is submitted that the flats could not have been sold by the defendant nos. 1 to 3 to the defendant no.4 after the MOU was executed between the plaintiffs and the defendant nos. 1 to 3 on 24.02.2009. It is submitted that the appellants had a first charge over the flats and the case of the defendant nos. 1 to 3 that the appellants had later on agreed to purchase a three bed room flat in the said building but had failed to pay the consideration for the same and therefore the transactions in that regard did not materialize is incorrect. It is submitted that it would be necessary to appoint the receiver for the properties in the circumstances of the case. It is submitted that since in terms of the interim orders passed by this Court in the appeal, the defendant nos. 1 to 3 have deposited the sum of Rs.1,30,00,000/- with interest and the appellants are permitted to

withdraw the amount, if this Court is inclined to reject this appeal, the deposit of the said amount by the defendant nos. 1 to 3 and the withdrawal of the same by the appellants should be made subject to the result of the suits.

On hearing the learned counsel for the parties and on a perusal of the plaint and the documents that form a part of this appeal memo as also the order of the learned Judge, we find that the prayers made in the notice of motion filed by the appellants were rightly rejected by the learned Single Judge. The appellants had pleaded in the suits that in pursuance of the MOU dated 24.02.2009, the defendant nos. 1 to 3 were liable to allot two flats to the appellants and hand over the possession of the same to them on or before 31.03.2012. Had the appellants proceeded only on the said basis, the learned Single Judge could have considered granting the prayers made by the appellants in the notice of motion. However, in para 12 of the plaint, the appellants had pleaded another case that after the flats sought to be sold to the appellants were sold by the defendant nos. 1 to 3 to the defendant no.4, there was an understanding between the appellants and the defendant nos. 1 to 3 that the net-value-consideration of the flats would be returned by the defendant nos. 1 to 3 to the appellants and in pursuance of that understanding an amount of Rs. 46,48,000/- was returned by the defendant nos. 1 to 3 to the appellants. The learned Single Judge rightly considered this aspect of the matter while deciding the notice of motion. It was appropriately observed by the learned Single Judge in the orders appealed against that *prima facie* it appeared that the

appellants had acquiesced in the disposal of the flats to the defendant no.4 and had agreed to accept the refund of the money paid by them to the defendant nos. 1 to 3 for the said flats. It was observed by the learned Single Judge and rightly so that if the refund did not come through, the plaintiffs could have at the most have had a money claim against the defendant nos. 1 to 3 but a claim for the specific performance of the agreement to sell the two flats could not have been made. We are in agreement with the *prima facie* view expressed by the learned Single Judge. Had the appellants not pleaded in para 12 of the plaints that after the flats were sold to the defendant no.4 there was an understanding between the appellants and the defendant nos. 1 to 3 that the defendant nos. 1 to 3 would return the amount of Rs. 1,35,00,000/- to the appellants, the learned Single Judge and also this Court would have proceeded in deciding the matter as if the appellants had filed the suits only on the basis of the MOU that was executed between the appellants and the defendant nos. 1 to 3 on 24.02.2009. We find that the approach of the learned Single Judge in deciding the notice of motion is just and proper. In the circumstances of the case, the view expressed by the learned Single Judge could have been the only view possible. In view of the pleadings of the appellants in para 12 of the plaints, the case of the appellants that the appellants would have the first charge on the flats would *prima facie*, fall to the ground. However, since in pursuance of the interim orders passed by this Court, the defendant nos. 1 to 3 have deposited a sum of Rs.1,51,00,000/- in this Court and the appellants have partly withdrawn the amount,

the consequences of the interim order would be subject to the result of the suits. The learned counsel for the respondents fairly states that the defendant nos. 1 to 3 have no objection if the appellants withdraw the balance amount deposited by the defendant nos. 1 to 3 in this Court after furnishing surety/security.

In the aforesaid set of facts, since the learned Single Judge had rightly rejected the prayers made in the notice of motion for appointment of the receiver as the suits filed by the appellants ought to have been only for the recovery of the amount rather than specific performance of contract, we direct the receiver appointed by this Court to hand over the possession of the flats as also the movable property to the defendant nos. 1 to 3 within one week.

Since the orders appealed against are just and proper, we dismiss the appeals with no order as to costs.

With the disposal of the appeals, the notice of motion stand disposed of.

(Sarang V. Kotwal, J)

(Smt.Vasanti A Naik, J)