

**CORAM:** B.R. GAVAI &  
RIYAZ I. CHAGLA, JJ.  
**DATE:** 13TH DECEMBER, 2018.

2. On 23rd October, 2010, the Plaintiff / Respondent herein had paid a sum of Rs.11 Crores to the Defendant / Appellant herein towards purchase of certain property at village Oshiwara ("Suit property") out of a total agreed consideration of Rs.12 Crores. The balance payment of Rs.1 Crore was to be paid at the time of execution of the Deed of Conveyance. Accordingly, an Agreement for sale was executed on 24th December, 2010 between the Appellant and the Respondent. The Appellant authorised one Dipchand Gardi, Director of the Appellant to complete the sale on 8th October, 2011. Meanwhile, a sum of Rs.9.8 Crores was paid by one Hasumukh Gardi, Director of the Appellant to one M/s. Aryaman Developers Pvt. Ltd. (for short "M/s. Aryaman") in relation to a separate transaction and for part refund of amount received under that transaction. The Appellant was avoiding completion of the sale and it had conveyed the said property by the Deed of Conveyance dated 27th December, 2012 in favour of M/s. Kalpavruksh Developers for consideration of Rs.15 Crores out of which only Rs.1 Crores was paid. The Respondent filed a complaint with the Gamdevi Police Station resulting in a first information report being registered. The sad Mr. Dipchand Gardi who was authorised by the Appellant to complete the sale with the Respondent applied for anticipatory bail together

with the other family members. The application came to be rejected and as a result the said Mr. Dipchand Gardi together with Chandrika Gardi sought quashing of the criminal proceedings initiated against them by the Respondent. The parties to the Writ Petition came to an amicable settlement under which the Appellant was to revoke or cancel the conveyance in favour of M/s. Kalpavruksh Developers within 9 months, failing which the Respondent could either sue for specific performance or terminate the agreement for sale between the Respondent and the Appellant. Accordingly, an MoU was drawn up and the same was executed. The operative portions of the MoU are reproduced below:-

***1. Without prejudice to the right of the party of the Second Part to seek specific performance of the Said Agreement dated 24th December, 2010 and to set aside Conveyance dated 27th December, 2012 executed by the Party to the First Part in favour of Kalpavruksha Developers, they agree to withdraw the Criminal Complaint numbered as FIR No. 78 of 2018.***

***2. Party of the first Part shall at their cost, get the said conveyance dated 27th December, 2012 executed by the Party to the First part in favour of Kalpavruksha Developers cancelled within nine months by returning the amount, if any, received by Party of the First Part from the said Kalpavruksha Developers and / or any other amount that may be mutually agreed between the party of the First Part and the said Kalpavruksha Developers.***

***3. In the event party of the First Part is unable to get the said Conveyance dated 27th December, 2012 revoked / cancelled within nine months, then the Party of the Second Part may either file/ continue a suit for specific performance or at their option, any time thereafter terminate the said Agreement dated 24th December, 2010. In the event Party of the Second Party exercises an option to terminate the Agreement then upon such termination, Party of the First Part shall pay a sum of Rs. 13.50 Crores to the Party of the Second Part (which is inclusive of Rs.11 Crores already paid by the Party of the Second Part) within a period of three months thereafter. Upon such payment, Party of the Second Part shall have no claim or demand of any nature whatsoever against Party of the First Part on in respect of the said land”.***

3. It transpired that the Appellant failed to cancel the conveyance as agreed under the MoU and as a result the Respondent exercised its option to terminate the agreement for sale vide letters dated 2nd and 3rd May, 2014 and called upon the Appellant to refund the sum of Rs.13.50 Crores under the MoU.

4. It appears that there was a Suit filed by M/s. Kalpavruksha Developers against one M/s. Samarth Development Corporation (for short “M/s. Samarth”) in this Court and in which Suit the Appellant confirmed that M/s. Kalpavruksha Developers is the owner of the said property and supported the said M/s. Kalpavruksha Developers. It thus became apparent that, the Appellant had no intention of revoking or cancelling the Deed of

Conveyance in favour of M/s. Kalpavruksha Developers. The Appellant demanded the refund of the sum of Rs.13.50 Crores under the MoU with interest at the rate of 18% p.a. The Appellant continued to deny liability under the MoU. Accordingly, the above Summary Suit was filed against the Appellant by the Respondent claiming a decree in a sum of Rs.13.50 Crores together with interest. The above Summons of Judgment was also taken out in the said Suit and Affidavit in Reply came to be filed on behalf of the Appellant by the said Mr. Hasmukh Gardi. It was contended in the reply that Mr. Hasmukh Gardi was not involved in the day to day management of the Appellant Company which was looked after by his Late father Mr. Dipchand Gardi who had expired by then. The heirs of the Late Dipchand Gardi had reposed full faith in all the acts done by him. Mr. Hasmukh Gardi has questioned the maintainability of suit as also entitlement to claim interest @ 18% p.a. In the said reply it is further contended that the sum of Rs.11 Crores was paid pursuant to an oral understanding arrived at between the Respondent's partners and the Late Dipchand Gardi for acquiring the suit property. It was stated that despite the Respondent being aware of third party interest created in favour of M/s. Samarth, the partners of the Respondent had represented to the Late Dipchand Gardi that they had cleared all encumbrances

at their cost and since the Respondent could not comply with their obligation, the conveyance was not insisted upon. It is further contended by the Appellant that at the request of all the Respondent partners, payment of Rs.9.80 Crores was made to one M/s. Aryaman by the Appellant and this sum was to be adjusted and accounted towards the amount due to the Respondent. It is accordingly contended by the Appellant that there are triable issues in as much as the claim of the Respondent of Rs.13.50 Crores is unattainable in view of payment of Rs.9.80 Crores to M/s. Aryaman and that no interest was payable as claimed in the Suit. The Appellant accordingly claimed for unconditional leave to be granted.

5. The learned Judge by the impugned order has held that the Appellant is liable under the MoU. The learned Judge has further not accepted the contention of the Appellant that the sum of Rs.9.80 Crores stated to have paid by the Appellant to the said M/s. Aryaman was to be adjusted and accounted towards the amount due to the Respondent. The learned Judge has observed that this contention was raised by the deponent of the Affidavit in Reply despite his contention that he was not involved with the business and day to day management of the Appellant and accordingly was an incorrect statement. The learned Judge has

further observed that it was only in the reply to the said notice that the Appellant took up a plea that a sum of Rs.9.80 Crores paid to M/s. Aryaman was to be adjusted and accounted towards the amount due to the Respondent. In fact this was the only defence set out by the Appellant to the Respondent's demand of payment under the MoU. It is further observed that the Defendant's case is clearly dishonest as seen from the fact that the MoU does not mention that Rs.9.80 Crores paid by the Appellant was adjusted against amounts due to the Respondent. It is recorded in the impugned order that this MoU was made part of the order passed by the Division Bench of this Court dated 19th October, 2013 and wherein it was observed that the matter was purely civil in nature and "allowing criminal prosecution to continue would be an abuse of the process of the Court". The learned Judge has thus held that the MoU has been executed unconditionally by the Appellant in order to secure relief from the criminal prosecution and the Appellant has thereafter sought renege on its obligation to pay the admitted sum under the MoU. It is accordingly held that the defence set up by the Appellant is moonshine and dishonest and the Appellant is not entitled to defend the Suit. Being aggrieved by the impugned order, the Appellant has filed the present Appeal.

6. Shri Dhakephalkar, learned Senior Counsel appearing for the Appellant has submitted that the Summary Suit filed by the Respondent is not maintainable. He has submitted that the MoU entered into between the Appellant and the Respondent and under which the sum of Rs.13.50 Crores was agreed to be paid by the Appellant and which is claimed in the Summary Suit and which has been decreed by the learned Judge itself refers to the Agreement of sale dated 24th December, 2010, specific performance of which has been expressly reserved in the MoU. He has submitted that the MoU is not the final agreement between the parties and hence a decree could not have been passed by the learned Judge for the sum of Rs.13.50 Crores payable under the MoU. He has further submitted that a supplemental MoU was entered into between the Appellant and the Respondent and which is undated and which overrides clause 3 of the MoU. Under clause 3 of the MoU, the Appellant was obliged to cancel the conveyance dated 27th December, 2012 with the said M/s. Kalpavruksha Developers within 9 months of the execution of the MoU i.e. 30th September, 2013. However, this period would now have to be computed from the execution of the supplemental MoU and as the date of execution of the supplementary MoU is to be determined, being undated, this was a matter of trial and evidence

and could not be decided in Summary proceedings. He has submitted that failure on the part of the Appellant to have the conveyance with M/s. Kalpavruksha cancelled was on account of reasons beyond the control of the Appellant. He has further submitted that the issue of whether the Appellant paid a sum of Rs.9.80 Crores to M/s. Arayaman at the instance of the Respondent and whether the same discharges the obligation under the MoU are matters which could be determined only after leading evidence. He has accordingly submitted that the defence has erroneously been considered by the learned Judge to be moonshine and dishonest. He has submitted that the learned Judge ought to have allowed the Appellant to defend the Suit as triable issues have been raised by the Appellant which require determination and the Suit could not have been dismissed in such a summary manner. He has submitted that even granting of interest by the learned Judge is erroneous as there was no agreement between the parties on interest to be paid. Accordingly, he submits that the impugned order be set aside.

7. We have considered the submissions. We are of the view that the MoU has been unconditionally executed between the Appellant and the Respondent and under which the sum of Rs.13.50 Crores was payable by the Appellant. The MoU forms

part of the order passed by the Division Bench of this Court dated 19th October, 2013 and by which the Criminal Writ Petition filed by the Appellant for quashing the criminal prosecution initiated by the Respondent was allowed on account of the amicable settlement recorded therein. It was observed by the Division Bench of this Court that allowing the criminal prosecution to continue in light of mutual settlement under the MoU would be an abuse of the process of this Court. We find that the Appellant has thereafter sought to renege on the obligation to pay the admitted sum of Rs.13.50 Crores to the Respondent under the MoU and raised defences which are merely an after thought i.e. that the sum of Rs.9.80 Crores was paid to M/s. Aryaman by the Appellant which sum was to be adjusted and accounted towards the amount due to the Respondent. This is further evident from the MoU which makes no reference to the said sum having been paid to M/s. Aryaman and / or this sum being adjusted towards the amounts due to the Respondent. The MoU being an admitted agreement between the parties was required to be complied with by the Appellant by making payment of the amount of Rs.13.50 Crores. Further, the learned Judge has correctly found inconsistencies in the case of the Appellant, particularly with regard to the statements made by Mr. Hasmukh Gardi in the Affidavit in Reply to

the Summons for Judgment where despite stating that he had paid the sum of Rs.9.80 Crores to M/s. Aryaman, he has stated that he was not involved with the business and day to day management of the Appellant.

8. We find that there is no infirmity in the impugned order which has held that the Appellant is liable under the MoU, being an admitted agreement and relied upon by the parties in getting the criminal prosecution quashed. We find the execution of a supplemental MoU and / or clause 3 of MoU being overridden by the supplementary MoU was not raised before the learned Judge who passed the impugned order. It has been raised for the first time in the Appeal. In fact, the submissions made by the learned Judge pertain to the MoU executed between the Appellant and Respondent on 30th September, 2013 as being the final agreement which formed part of the order passed by the Division Bench of this Court dated 19th October, 2013. We do not accept the submissions of the learned Senior Counsel made on behalf of the Appellant that the MoU is not the final agreement between the parties and / or that a supplemental MoU had been entered into between the parties. The submission on behalf of the Appellant that the conveyance with M/s. Kalpavruksha was not cancelled on account of reasons beyond the control of the Appellant is

irrelevant as the MoU has itself provided that in the event the conveyance was not cancelled within 9 months of execution of the MoU, the Respondent could terminate the Agreement of Sale dated 24th December, 2010 and upon such termination the Appellant shall pay the sum of Rs.13.50 Crores to the Respondent.

9. We are of the considered view that there is no perversity on facts and / or infirmity in the impugned order passed by the learned Judge that requires interference by the Appellate Court. We are of the considered view that the learned Judge has correctly held that the Appellant is not entitled to defend the Suit as the defence set up by the Appellant is moonshine and dishonest.

10. Accordingly, the Appeal is without merit and is dismissed.

**(RIYAZ I. CHAGLA J.)**

**( B.R. GAVAI, J.)**