

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION ST. NO. 28913 OF 2019

Mahendra Sridhar Attarde	.. Petitioner
Versus	
The State of Maharashtra & ors	.. Respondents

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Mr. A.M. Saraogi for the petitioner.
Mr.K.S. Thorat, AGP for Respondent No.1.
Mr.Sidharth Samantaray with Dimple Tejani I/b Medha Rane for Respondent No.1.
Mr. J.S. Kini with Ms.Sapna Krishnappa for respondent nos.3 and 4.

CORAM: PRADEEP NANDRAJOG, C.J.
AND BHARATI DANGRE, J.

DATED : 13th NOVEMBER, 2019

P.C:-

- 1 Upon mentioning, taken on Board.
- 2 Heard learned counsel for the parties.
- 3 Flat No.706, 7th floor on Building A2, Shiv Siddhi Lok Kailash, JSD Road, Mulund, is the subject matter of an agreement to sell dated 8th January 2015 executed by the petitioner and Respondent Nos.3 and 4. The said agreement in writing records the sale consideration to be ₹1.2 crore. The sale

consideration had to be paid in three instalments, ₹ 13.8 lakhs at the time of execution of the agreement to sell, ₹ 1.2 lakhs to be adjusted towards TDS and deposited with the bank with certificate to be issued to the transferor and ₹ 1.05 crores on or before 15th January 2015. The agreement specifically records that right, title or interest in the flat would not be transferred or conveyed to the transferee i.e. respondent Nos.3 and 4 till full sale consideration is paid. On the strength of the said agreement to sell, Respondent No.2 advanced a credit to Respondent Nos.3 and 4. The credit utilized by Respondent Nos.3 and 4 was partly utilized in the form of Respondent No.2 making direct payment to the petitioner in sum of ₹ 65 lakhs towards the sale consideration.

4 Full sale consideration has yet to be paid.

5 The petitioner has filed his Suit seeking cancellation of the agreement to sell.

6 What has necessitated the instant petition is action taken by the respondent to enforce the security interest, an order under Section 14 of the SARFAESI Act, 2002 has been obtained by Respondent No.2 and the petitioner has filed S.A.(L) No.1252 of 2019 before DRT questioning the flat being offered as security by Respondent Nos.3 and 4 to Respondent No.2.

7 Vide order dated 9th October 2019, learned DRT has refused to pass the interim order on account of the fact that a Suit is pending *inter se* the petitioner and Respondent Nos.3 and 4.

8 Contention advanced in the petition is simple that the sale agreement dated 8th January 2015 executed by the petitioner in favour of Respondent Nos.3 and 4 categorically records that no transfer or conveyance of any interest in the subject flat shall take place from the petitioner to Respondent Nos.3 and 4 unless the entire sale consideration is paid.

9 Learned counsel for Respondent Nos.2, 3 and 4 do not dispute that under the agreement to sell unless full sale consideration is paid, no interest passes from the petitioner to Respondent Nos.3 and 4 but urge that apart from ₹ 13.8 lakhs received by the petitioner when the agreement to sell was executed to the account of Respondent Nos.3 and 4 being debited, Respondent No.2 paid ₹ 58,37,000/- to the petitioner. The petitioner received in this manner ₹ 72,17,500/-. The petitioner refunded ₹ 13.8 lakhs to Respondent Nos.3 and 4 and thus is still having with him ₹ 58,37,500/-.

10 Learned counsel for the respondent bank urges that as per the agreement in question, in the event of the sale not being

completed to the fault of respondent Nos.3 and 4, the petitioner would at best be entitled to forfeit ₹ 15 lakhs. Counsel urges that since the petitioner has sought the relief of cancellation of the agreement to sell, the petitioner would at best be entitled to retain only a sum of ₹ 15 lakhs and thus, the petitioner must return ₹ 43,37,500/-. Counsel for the petitioner responds that the agreement to sell dated 8th January 2015 was followed by a rectification of the sale agreement executed on 10th February 2015 as per which entire consideration received by the petitioner would be liable to be forfeited on default by respondent nos.3 and 4.

11 A perusal of the rectification of sale agreement shows that it records that the transferee shall be liable for expenses incurred and for losses caused to the transferee if they are not paid and the money paid by the transferee towards earnest money/part payment shall be forfeited.

12 It being settled law that where in an agreement for breach thereof damages are provided, the same would be the upper measure of damages and what would be finally awarded would be upon proof of the damages actually suffered.

13 In the Suit seeking cancellation of the agreement to sell, we do not find any pleadings concerning damages and thus, we declare that the petitioner would be liable to refund ₹

43,77,500/- to the second Respondent as a condition for stay of the sale of flat in question.

14 We dispose of the Writ Petition directing that upon the petitioner depositing ₹ 43,77,500/- to the respondent No.2 within two weeks from today, the attached flat shall not be sold. As regards the possession of the flat, the learned DRT shall pass suitable orders.

SMT. BHARATI DANGRE, J

CHIEF JUSTICE