

JPP

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

COMMERCIAL APPEAL NO. 212 OF 2019

in

NOTICE OF MOTION NO. 357 OF 2017

with

NOTICE OF MOTION NO. 63 OF 2019

in

COMMERCIAL APPEAL NO. 212 OF 2019

Mukesh Balabhai Patel and Ors.

... Appellants
(Orig. Defendant Nos. 2 to 5)

V/s.

1. Jayesh Ratilal Jogia

... Respondent No. 1.
(Orig. Plaintiff)

2. M/s. Tulip Shapes and Structures
Pvt. Ltd.

... Respondent No. 2
(Orig. Defendant No. 1)

Mr. J.P. Sen, Senior Advocate a/w. Makarand Raut for the Appellant/Applicant.

Mr. Omkar Khanvilkar a/w. Drasti Jani a/w. Miloni Sanghvi I/b. M/s. Solicis Lex for the Respondent No. 1.

Mr. Pesi Modi, Senior Advocate a/w. Ms. Kalpana Desai I/b. Hariyani & Co. for Respondent No. 2.

***CORAM : PRADEEP NANDRAJOG, C.J. &
N.M. JAMDAR, J.***

DATE : 9 APRIL 2019.

P.C. :-

1. Heard learned Counsel for the parties in the Appeal. The Respondent is the Plaintiff. Suit seeks specific performance of an agreement to sell.

2. A project known as Tulip Garden on land comprised in Village Kandivali had to be developed and flats constructed thereon. The Plaintiff relies upon an agreement as per which five flats bearing No. 901, 902, 903, 1001 and 1003 on the 9th and the 10th floors were to be sold to the Plaintiff for a consideration of ₹ 7.5 crores. As per the Plaintiff, he gave ₹ 7.5 crores as the sale consideration but received back ₹ 2.00 crores. There are averments in the plaint of an MOU dated 2 August 2013 to protect ₹ 5.00 crores. Out of the sale consideration, as per the MOU, it was repayable after lock in period of 15 months with accumulated interest thereon.

3. The relief sought in the suit does not pertain to the MOU in question notwithstanding pleading qua the same in the plaint. Relief sought is a decree for specific performance.

4. Unfortunately for the Plaintiff, the learned Single Judge granted an ad-interim order requiring the Defendant to maintain status-quo qua the land on which the flats had to be constructed. It stalled the project.

5. The impugned order was passed on 11 December 2018 noting that the Defendant had admitted ₹ 5.5 crores received from the Plaintiff pursuant to the agreement to sell. The order notes that the construction work has not commenced. Confirming the ad-interim order dated 17 March 2017 read with order dated 20 March 2017, further direction is issued in paragraph 5 of the impugned order requiring the Defendant No.1 to deposit a sum of ₹ 6.00 crores with the Prothonotary and Senior Master, High Court, Bombay. The order records that upon compliance, the status-quo granted vide earlier interim orders would be vacated.

6. The grievance in the Appeal is to the direction issued in paragraph 5 of the impugned order. Contention advanced is that in a suit for specific performance of an agreement to sell where the Defendant does not deny the obligation under the agreement to sell and states reasons as to why Defendant is unable to proceed with the project, relief by way of an interim measure to deposit the sale consideration would be contrary to the claim in the suit.

7. In a suit for specific performance the right of the buyer can be protected by requiring the Defendant not to transfer, alienate, encumber or create third party rights in the property forming subject matter of the agreement to sell.

8. Conscious of the fact that building work has yet to commence and the flats which were agreed to be sold to the Plaintiff have yet to see the light of the day, the just and equitable order to preserve the right and interest of the Plaintiff is to restrain the Defendant from transferring, alienating or creating third party rights in the five flats which the Defendant would sell to the Plaintiff after constructing the building.

9. The Appeal is disposed of setting aside the impugned order dated 11 December 2018. The Notice of Motion No. 357 of 2017 filed by the Plaintiff before the learned Single Judge is disposed of issuing the directions/injunctions as above.

10. In view of disposal of the Appeal the Notice of Motion (St.) No. 63 of 2019 does not survive and the same is disposed of accordingly.

11. No costs.

N.M. JAMDAR, J.

CHIEF JUSTICE