

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 2865 OF 2019
WITH
WRIT PETITION NO. 2866 OF 2019**

Joma Chahu Mhatre (Deceased)
through LRs. Pandurang Joma Mhatre & Ors. ..Petitioners
Vs.
M/s. Skyline Construction through Partners
& Ors. ..Respondents

Mr. Prasad S. Dani, Senior Advocate a/w. Mr. Prashant D. Patil, for
the Petitioners.
Mr. S. M. Oak a/w. Mr. Sagar Joshi, for the Respondent No.1.

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**CORAM : C.V. BHADANG, J.
RESERVED ON : 8 SEPTEMBER 2021
PRONOUNCED ON : 20 DECEMBER 2021**

P.C.

. Both these Petitions can be conveniently disposed of by this
common order.

2. For the sake of convenience, the facts are narrated with
reference to Petition No.2865/2019. The Petitioners are original
Defendant Nos.1 to 12 in Special Civil Suit No.32/2011, filed by the

first Respondent M/s. Skyline Construction through its Partners. The Respondent Nos.2 to 4 are officers representing CIDCO who are Defendant Nos.13 to 15. The Respondent No.5 M/s. Krishna Sarang Construction is the original Defendant No.16 in the suit.

3. The land admeasuring 600 sq. meters from out of Plot No.9, Sector 5A of Village Karanjade, Tehsil Panvel, District Raigad, is the subject matter of dispute and is referred to as the suit property. Plot No.9 was allotted to now deceased Joma Chahu Mhatre, the predecessor of the Petitioners, by CIDCO, under the 12.5% scheme in lieu of other lands acquired. It is the material case that the suit property was agreed to be sold to the first Respondent – Plaintiffs for a consideration of Rs.8 Lakhs per 100 sq. meters under an agreement dated 6 April 2010. The Plaintiffs have admittedly paid an amount of Rs.8,22,500/- to the Petitioners. The Plaintiffs were all along ready and willing to perform their part of the contract. However, the Petitioners have refused and neglected to execute the sale deed. The Petitioners have subsequently entered into an agreement dated 22 October 2014 with the Respondent No.5 in respect of the suit property.

4. It is in these circumstances that the Plaintiffs filed the suit for declaration that the agreement dated 22 October 2014 is illegal and not binding on the Plaintiffs and for specific performance of the

agreement dated 6 April 2010 and an injunction not to create third party interest and for possession. In the alternative, the Plaintiffs have claimed damages – compensation of Rs.40 Lakhs and for consequential reliefs and direction. The Plaintiffs filed an Application (Exh.5) for temporary injunction to restrain the Petitioners – Defendants from creating third party interest in the suit property and residential plots received by the Petitioners under the 12.5% scheme, from CIDCO.

5. The Petitioners and the Respondent No.5 have resisted the suit on all conceivable grounds. It was inter alia contended that the Plaintiffs were not ready and willing to perform their part of the contract, of which time was of the essence. The contract is not specifically enforceable, in view of the subsequent events. The suit property has been allotted on 5 November 2014 and thus was not in existence in the year 2010. It was also contended that the Plaintiffs having claimed damages / compensation, are not entitled to specific performance. The valuation of the suit for purposes of Court fees and jurisdiction has also been disputed. It was contended that the Plaintiffs are not entitled to specific performance in view of Section 16 of the Specific Relief Act. Consequently, the interim injunction cannot be granted as any such interim relief is always in the aid of final relief. It was also contended that already third party rights are created by accepting a sum of more than Rs.2 Crores from the

Respondent No.5 and therefore, the Plaintiffs are not entitled to any equitable relief.

6. The learned Trial Court by an order dated 4 March 2015 has granted Application (Exh.5), which order is confirmed by the learned District Judge by judgment and order dated 14 September 2018 in Civil Misc. Application No.102/2015. Feeling aggrieved, the Petitioners are before this Court.

7. The facts in the companion petition being Writ Petition No.2866/2019 are similar, except that it arises out of Special Civil Suit No.30/2011 between the parties.

8. I have heard the learned counsel for the Petitioners and the Respondents. The parties have also filed synopsis of their arguments. With the assistance of the learned counsel for the parties, I have gone through the record.

9. It is submitted by the learned counsel for the Petitioners that the Plaintiffs have not made out any case, much less prima facie case for grant of relief of specific performance, particularly, in view of Section 16 of the Specific Relief Act. It is submitted that the suit property was not in existence as on the date of the agreement of which specific performance is sought for. It is submitted that the

Plaintiffs have not otherwise shown, readiness and willingness to perform their part of contract. It is submitted that the Court's below have misread the pleadings of the Petitioners, as to the circumstances in which the development agreement was executed by the Petitioners, in favour of the Plaintiffs, which have wrongly been taken as admission. It is submitted that the time was of the essence of the contract and said contract has already been held to be not enforceable and the relevant issue has been deleted. It is submitted that even otherwise the Respondent No.1 has claimed damages and therefore is not entitled to any interim relief. It is submitted that therefore no irreparable loss would arise to the Plaintiffs and the balance of convenience does not lie in favour of the Plaintiffs. It is submitted that the Petitioners who are the owners / vendors and the Respondent No.5 as a vendee is entitled to enjoy the property or its usufruct.

10. The learned counsel for the Respondent No.1 has supported the impugned order. It is submitted that the Petitioners have not disputed the execution of the agreement dated 6 April 2010 and receipt of Rs.8,22,500/-. It is submitted that the Respondent No.1 was all along ready and willing to perform its part of the contract and the Petitioners have not demonstrated to the contrary. It is submitted that the claim for damages / compensation is the alternative relief which does not derogate from the main relief of

specific performance. It is submitted that the order on the preliminary issue deleting the relief of specific performance is subject matter of challenge before the learned District Judge which Appeal is admitted and thus has not attained finality. It is submitted that in the event, the third party rights are allowed to be created, thereby creating the possibility of change of nature of suit property, the suit claim is liable to be rendered infructuous. Thus, the balance of convenience for grant of the relief would lie in favour of the Plaintiffs.

11. The learned counsel also submitted that the Respondent No.5 which presently claims to have an interest in the suit property by virtue of the agreement dated 22 October 2014 has not chosen to challenge the order and therefore the challenge at the instance of the present Petitioners is not sustainable.

12. I have considered the circumstances and the submissions made.

13. The execution of the development agreement dated 6 April 2010 is not disputed by and on behalf of the Petitioners. The Petitioners are also not disputing the receipt of Rs.8,22,500/- out of which Rs.4 Lakhs was paid at the time of the agreement and Rs.4,22,500/- was paid on 10 August 2010. Although, the first

Respondent is claiming that further amounts were paid which aspect is disputed, the fact remains that the receipt of Rs.8,22,500/- is not disputed by the Petitioners. The suit was filed in the year 2011 i.e. within a year from the execution of the agreement. The record also discloses that the Petitioners have entered into agreement with the Respondent No.5 on 22 October 2014 in respect of the suit property for Rs.5,83,00,000/-, out of which, the Petitioners had received an earnest of Rs.2,08,81,250/-. This agreement was apparently executed during the pendency of the suit and at least *prima facie*, it is not shown that the said transaction was without notice of the earlier agreement of the year 2010 in favour of the Plaintiffs and/or the pendency of the suit. The question whether the Respondent No.5 (Defendant No.16) is the bonafide purchaser for value without notice can be gone into at the stage of the trial. In so far as the contention on behalf of the Petitioners that the property was not in existence in the year 2010, as it was allotted by CIDCO subsequently, the same may not come in the way of the Plaintiffs at this stage. The learned Trial Court has placed reliance on Section 31 and 32 of the Contract Act, to *prima facie* find that it is a 'contingent contract'. Although the reasoning by the learned Trial Court that it is a contingent contract placing reliance on Section 31 and 32 of the Contract Act, in my view cannot *prima facie* be accepted, the principle akin to feeding the grant by estoppel, can be invoked to *prima facie* support the agreement of the year 2010 as admittedly

subsequent to the said agreement the property has been allotted to the Petitioners – vendors.

14. The learned counsel for the Petitioners has relied upon the order passed by the Trial Court on 10 April 2018 on the preliminary issue by which the relief for specific performance has been deleted. Thus, the suit as of now subsists only in respect of the claim for compensation / damages. This is the order which is passed subsequent to the order passed by the Trial Court rejecting the Applications for temporary injunction. Therefore, these subsequent events were pressed into service before the learned District Judge in the Appeal. The learned District Judge has dealt with this aspect in para 32 to 34 as under-

32. Apart from it, the copy of order on Exh.1 dated 10/4/2018 with list Exh.25 shows prima facie that, the Trial Court heard the preliminary legal objection and passed order “1 – Relief of specific performance of contract and relief in consequence are held to be not maintainable, barred by the provisions of law and also without cause of action. 2 – Issues pertaining to the claim of relief of specific performance of contract for sale and relief of injunction are hereby deleted by keeping intact the issues pertaining to the relief of damages prayed for by the plaintiff. 3 – The framework of issues at Exh.74 to be modified accordingly.”

33. The plaintiffs/respondents No.1/A to 1/D have not controverted arguments of advocate of appellants

and respondent No.5 and brought contrary position including challenge to aforesaid order etc.

34. However, on perusal of copy of plaint at page Nos.1 to 26 alongwith the paper book, it appears that, the plaintiffs/respondents No.1/A to 1/D have claimed reliefs of declaration that, agreement of sale dated 6/4/2010 is legal and valid, agreement dated 22/10/2014 is illegal and not binding on them, vacant possession of the suit property, injunction not to alienate or create third party interest in suit property and compensation of Rs.40,00,000/- alongwith 24% interest from the defendants / appellants, apart from the relief of specific performance, consequent reliefs.

15. The reasoning cannot strictly be approved. This is because the declaration as to the validity of the agreement dated 6 April 2010 and the invalidity of the agreement dated 22 October 2014 is inextricably linked to the relief of specific performance. Precisely, the contention on behalf of the Petitioners is that if the suit only survives in so far as the relief of the compensation is concerned, which is a monetary relief, the Plaintiffs can be compensated in the event the Plaintiffs succeeds in the suit and therefore, there is no irreparable loss which plaintiffs may entail, if the injunction is not granted.

16. It is necessary to note that the order dated 10 April 2018 passed by the Trial Court was challenged by the Appellant before this Court in Writ Petition No.13020/2018 with Writ Petition

No.306/2019 which were withdrawn on 14 October 2019 in view of the objection as to maintainability raised in the said Petition. This Court disposed of the Writ Petitions with liberty to the first Respondent – Plaintiff to challenge the order passed on 10 April 2018 before the Competent Appellate Court. It appears that the first Respondent had filed Civil Appeals in which office of the learned District Judge has raised an objection and the learned District Judge by an order dated 9 August 2018 has dismissed the Appeal upholding the objection raised by the office. It is undisputed that the Respondent No.1 has filed Review Application Nos.13/2020 and 14/2020 for review of the judgment and order dated 9 August 2018 in which there was a delay. The delay has now been condoned and the Applications for review are said to be pending.

17. Although the deletion of the relief / issue about specific performance has some significance on the grant of temporary injunction as such interim relief is always in the aid of final relief, I am not inclined to act on the same, at this stage for the reason that the said order passed by the Trial Court dated 10 April 2018 is subject matter of challenge before the learned District Judge. Thus, purely for the reason that the said order has not yet attained finality, I am not inclined to act on the same.

18. After having carefully considered the rival circumstances and the submissions made, I do not find that a case for interference is made out in the impugned order. However, at the same time, the Petitioners need to be granted liberty to apply for modification of the impugned order passed by the learned Trial Court in the event, the order dated 10 April 2018 deleting the relief / issue of specific performance is confirmed by the learned District Judge. This will be dependent on the Applications for review and the outcome of the Appeals, if registered.

19. The companion Petition No.2866/2019 arises in similar circumstances between the parties. Its fate would govern itself on the basis of the reasoning and the outcome of Writ Petition No.2865/2019.

20. In the result, the following order is passed-

ORDER

1. The Petitions are dismissed. The impugned orders are hereby confirmed, subject to liberty to the Petitioners to apply for modification under Order XXXIX Rule 4 of the Civil Procedure Code, of the order passed by the Trial Court in the two suits, in the event, the orders dated 10 April 2018 passed by the

Trial Court deleting the prayers / issue for specific performance are confirmed by the learned District Judge, in the Applications for review and/or the Appeals, if so registered.

2. If such Applications are filed, the Trial Court shall decide the same on their own merits and in accordance with law. The rival contentions of the parties in this regard are left open.

3. The learned District Judge shall decide the Applications for review within a period of three months from the receipt hereof. In the event, the Appeals are registered, the learned District Judge shall decide the Appeals as expeditiously as possible and within a period of three months after their registration.

4. The parties to co-operate for the time bound disposal of the Review Applications / Appeals, if so registered.

5. In the circumstances, there shall be no order as to costs.

C.V. BHADANG, J.