

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**943 APEAL FROM ORDER NO.9 OF 2022
WITH CA/5845/2022 IN AO/9/2022**

**SHRIKANT SUDHAKAR DAHALE AND ANOTHER
VERSUS
PRATAP VISHWASRAO SHETE DIED AND OTHERS**

...

Advocate for Petitioners : Mr. Sawant Amol S.
Advocate for Respondent No. 6 : Mr. S. S. Gangakhedkar and Mr. Vivek V.
Kabade.

**CORAM : MANGESH S. PATIL, J.
DATE : 19.04.2022.**

PER COURT :

Admit.

2. Heard. Rule. The rule is made returnable forthwith. At the joint request of the parties, the matter is heard finally at the stage of admission.

3. The appellants are the original plaintiffs who failed to secure a decree for specific performance of an agreement to sell the suit property and were found entitled to claim refund of the earnest amount. They have preferred an appeal. By moving an application (Exh. 5) purportedly under Order XXXIX Rule 1 of the Code of Civil Procedure, they prayed for temporary injunction restraining the respondents/original defendants from creating any third party interest in the suit property till the appeal was decided.

4. The learned advocate Mr. Sawant for the appellants submits that interim relief in some form was in operation during pendency of the suit in the form of an undertaking furnished by the respondents that they would not create any third party interest till the suit was decided. The specific performance was not refused on failure of the appellants to prove the

agreement but only on the ground that they were held to be not ready and willing to perform their part of the contract. The lower appellate court has overlooked all these material aspects and has refused to exercise the jurisdiction vested in him on the sole ground that the suit for specific performance was dismissed. He would further point out that even the lower appellate court has found that in a parallel proceeding in respect of the self same suit property bearing Regular Civil Suit No. 390/2013, a similar order of temporary injunction is operating restraining the present respondents who are the defendants in that suit as well, from creating any third party interest and that was sufficient to protect appellants' interest. He would submit that the appellants are not parties to that suit and cannot be expected to monitor that proceedings.

5. He would submit that *prima facie*, the appellants were found to have agreed to purchase the suit property. They had parted with earnest money. Temporary arrangement in the form of an undertaking furnished by the respondents was in operation during pendency of the suit and the same arrangement should have been allowed to continue till decision of the appeal since the circumstances had not undergone any material change.

6. Learned advocate Mr. Gangakhedkar for the respondents supports the order. He submits that Section 52 of the Transfer of Property Act takes care of the situation and there is no need to grant any temporary injunction to enforce the self same right. He would submit that the trial court has recorded an emphatic finding demonstrating as to how the appellants had failed to prove that they were ready and willing to perform their part under the agreement which was an important precondition for grant of specific performance.

7. Learned advocate Mr. Gangakhedkar would further submit that in view of the provisions of Section 41 of the Specific Relief Act, when the appellants are themselves to be blamed for the situation they are in and

when they have failed to register the plaint so that Section 52 of the Transfer of Property Act could protect their interest, the injunction was liable to be refused. The lower appellate court though has not proceeded on these lines has demonstrated that *prima facie* there was no case in favour of the appellants and even the balance of convenience was not in their favour while rejecting the application. The discretion has been exercised judiciously and this Court should not replace it.

8. I have carefully considered the rival submissions and perused the impugned order as well as the papers. There cannot be any dispute about the fact that the trial court has recorded an affirmative finding as far as the rest of the issues, in favour of the appellants holding that by the agreement in dispute they had agreed to purchase and the respondents had agreed to sell the suit property for a consideration. There also cannot be a dispute that a part of the consideration had proceeded and was duly received by the respondents. Though there is a dispute as to if the period for execution of the sale-deed was extended by only some of the respondents and not all, the trial court has also recorded a finding that the suit was within limitation based on the self same agreement extending the time.

9. There also cannot be a dispute about the fact that by furnishing undertaking at Exh. 27 the respondents had undertaken before the trial court not to create any third party interest in the suit property and that arrangement had continued till decision of the suit. If such is the state of affairs, when the first appeal which is a statutory appeal under Section 96 of the Code of Civil Procedure has been pending before the lower appellate court, it is indeed surprising as to how merely because of the dismissal of the suit by the judgment and order, which decision was still to reach finality, any inference as to *prima facie* case or balance of convenience could have been drawn by the lower appellate court merely on the basis of the judgment passed by the trial court.

10. True it is that the appellants could have registered the plaint as is required by Section 52 of the Transfer of Property Act and that could have protected their interest. However, the fact remains that the plaint has not been registered. Perhaps, because of the undertaking furnished by the respondents before the trial court, everybody was comfortably placed and had continued with the arrangement. The lower appellate court has not considered all these aspects before reaching to a conclusion that because of the dismissal of the suit there is no *prima facie* case.

11. Besides, in the light of the recent pronouncement of the Supreme Court in the matter of **P. Ramasubbamma Vs. V. Vijayalakshmi and Ors.; in Civil Appeal No. 2095 of 2022 decided on 11.04.2022**, once an agreement to sell an immovable property is proved, generally, grant of specific performance is a rule and its refusal an exception. At the cost of repetition, the trial court has held that the agreement was duly proved. If such is the state of affairs, in my considered view, the lower appellate court has grossly erred in exercising the discretion that was vesting in it, judiciously. It has not referred to the material circumstances discussed herein above.

12. The appeal is allowed. The impugned judgment and order is quashed and set aside. The application for temporary injunction (Exh. 5) stands allowed. The respondents are temporarily restrained from creating any third party interest in the suit property till decision of the appeal before the District Court. Hearing of the appeal is expedited. Costs in cause.

13. Pending Civil Application is disposed of.

(MANGESH S. PATIL, J.)

mkd/-