IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.1296 OF 2020

Raju s/o Lalchandji Bundele,
Aged about 59 years,
Occ: Businessman & Agriculturist,
R/o Shrivastav Chowk, Dabki Road,
Akola, Tq. & Dist. Akola. .... **PETITIONER**

...V E R S U S...

Sau. Punjabi Gajanan Tayade,
Aged about 50 years, Occ: Business,
R/o Godbole Plot, Dabaki Road, Akola,
Tq. & Dist. Akola, through her Power
of Attorney Holder – Gajanan Motiram
Tayade, Aged about 56 years,
Occ: Business, R/o Godbole Plot,
Dabaki Road, Akola,
Tq. & Dist. Akola. .... **RESPONDENT**

Mr. H. R. Gadhia, Advocate for Petitioner.
Mr. D. R. Khapre, Advocate with Mr. D. R. Goenka, Advocate Respondent.

CORAM: **ROHIT B. DEO, J.**
DATE: **7th JANUARY, 2022.**

ORAL JUDGMENT:

Heard Mr. H. R. Gadhia, the learned Counsel for the petitioner and Mr. D. R. Khapre, the learned Counsel with Mr. D. R. Goenka, the learned Counsel for the respondent.

2. The petitioner is the original defendant in Special Civil Suit 55/2019 which is instituted by the respondent seeking decree of specific performance of contract and permanent injunction.

3. The suit plaint describes the property which is the subject matter of the suit as nazul plot 62 admeasuring 109.9 square meters or 1183 square feet with built up construction admeasuring 165 square meters, situated within the limits of Municipal Corporation, Akola.

4. The plaintiff contends that the suit property was jointly purchased by the plaintiff and the defendant by registered sale deed dated 28.04.2014 from Rani Anjum. The plaintiff contends that the defendant has agreed to sell portion admeasuring 24.75 square meters along with the structure, which is adjacent to the share of the plaintiff. According to the plaintiff, the said portion is agreed to be sold for total consideration of Rs.9,50,000/- (Rupees Nine Lacs Fifty Thousand) as is evident from the terms of the agreement of sale dated 14.08.2018. The plaintiff contends that she paid earnest amount of Rs.50,000/- (Rupees Fifty Thousand) to the defendant by cheque

dated 14.08.2018 and the balance was payable at the time of the execution and registration of the sale deed which was to be done on or before 14.02.2019. The plaintiff contends that as on the date of the agreement dated 14.08.2018 the suit property was not partitioned, and therefore, it was decided to effect partition and to delineate the respective shares by metes and bounds. The case of the plaintiff appears to be that after execution of the sale deed dated 28.04.2014 the plaintiff and the defendant realized that their vendor Rani Anjum induced them to execute an incorrect and illegal correction deed dated 17.07.2014 purporting to correct the area sold as 82.06 square meters and the plaintiff and the defendant have jointly instituted Regular Civil Suit 319/2015 against their vendor Rani Anjum seeking a declaration that the correction deed is illegal. The plaintiff contends that as requested by the defendant, an amount of Rs.1,00,000/- (Rupees One lac) was paid to stamp vendor Mr. Gajanan Pathak on 30.01.2019 by NEFT from the Allahabad Bank Account and two cheques were issued in favour of the defendant for the consideration of Rs.9,50,000/- (Rupees Nine Lacs Fifty Thousand) with the understanding that the earnest amount of Rs.50,000/- (Rupees Fifty Thousand) which was paid from the account of the husband of the plaintiff shall be refunded. It is then alleged that while the defendant did prepare the partition deed and the proposed sale deed, the plaintiff was not given any time to read the contents thereof and the signatures of the plaintiff were obtained on the said documents. The gist of the other averments in the plaint is that at the request of the defendant an amount of Rs.4,50,000/- (Four Lacs Fifty Thousand) was paid in cash instead of cheque, and yet the defendant avoided to execute the sale deed. The plaintiff alleges that she obtained certified copy of the partition deed on 22.03.2019 and realized that the partition deed incorrectly refers to the area of the property as 82.6 square meters. The plaintiff then refers to certain events which impelled her to conclude that the defendant is not interested in performing his part of the contract.

5. The defendant filed written statement and in paragraph 2 denied the description of the property. The defendant contended that there is no sub-division of the property. The defendant contended that after purchasing the property jointly from Rani Anjum, information gathered from the nazul department reveals that portion admeasuring 300 square feet was already sold in favour of one Sanjay Shah and the area in the sale deed was corrected. The defendant denied the receipt of earnest

of Rs.50,000/- (Rupees Fifty Thousand) or the execution of the agreement. The defendant denied that the contents of the partition deed were not read by the defendant. While the defendant did not deny that he and the plaintiff jointly instituted Regular Civil Suit 319/2015 against Rani Anjum, it is contended that the signature on the power of attorney was obtained and the defendant was not aware of the purpose of the institution of the suit. The defendant denied the receipt of Rs.4,50,000/- (Four Lacs Fifty Thousand) in cash. The defendant contended that the signature on the agreement of sale, purporting to be the signature of the defendant, is forged.

6. The plaintiff preferred application Exhibit-5 under Order 39, Rule 1 and 2 seeking an order restraining the respondent from creating third party interest in the suit property. The learned trial court rejected the application vide order dated 04.01.2020. The reasons recorded by the learned trial court are found in paragraphs 23 to 32 of the order impugned. The learned trial court observes that there is no *prima facie* evidence on record to show the payment of earnest of Rs.50,000/- (Rupees Fifty Thousand) to the defendant or then to show the source of the cash of Rs.4,50,000/- (Rupees Four Lacs Fifty Thousand) allegedly paid

to the defendant through Mr. Sandip Tayade. The trial court observes that the pre-litigation notice was issued on 18.06.2019, i.e. four months after the date decided for execution of the sale deed. The trial court then observes that the agreement of sale records area of the suit property as 109.09 square meters, which is contrary to the contents of the correction deed and the partition deed. The trial court then opines that whether the agreement is executed by the defendant in respect of 24.75 square meters of his share in the suit plot is to be proved on the basis of evidence on record and *prima facie* the plaintiff and the defendant appear to be owners only of 41.03 square meters of land.

7. Dissatisfied with the order of rejection of temporary injunction the plaintiff preferred Miscellaneous Civil Appeal 4/2020 which is decided by judgment dated 24.01.2020 rendered by the Ad-hoc District Judge-I, Akola. The appellate court allowed the appeal and restrained the defendant from creating third party interest in the suit property till the disposal of the suit.

8. The appellate court noted that the plaint in Regular Civil Suit 319/2015 instituted to challenge the validity of the correction deed is signed by the plaintiff and the defendant, and

that the defendant has not preferred an application seeking withdrawal from the said suit. The appellate court observes that the reliance placed by the defendant on the correction deed is misplaced since the correction deed appears to be *prima facie* illegal. The appellate court then referred to the affidavits placed on record by Sandip Tayade and Raju @ Sunil Jamode to the effect that on 11.02.2019 the defendant obtained the signatures of the plaintiff on the partition deed without giving an opportunity to read and understand the contents of the partition deed. The appellate court then considered the submission of the defendant that his signature on the agreement of sale is forged. The appellate court noted several circumstances to *prima facie* opine that the defendant did execute the agreement of sale. The appellate court noted that the plaintiff did pay Rs.1,00,000/- (Rupees One lac) to the stamp vendor and the slip of the cheque book substantiates the said payment. The affidavit of the stamp vendor Mr. Gajanan Pathak which is to the effect that he purchased the stamps and drafted the documents, is then noted. In so far as the earnest amount of Rs.50,000/- (Rupees Fifty Thousand) is concerned, the appellate court noted that the amount was paid from the bank account of the husband of the plaintiff, and the details of the payment are duly reflected in recitals in the agreement of sale. The appellate court further noted that the defendant did not explain why the husband of the plaintiff paid him Rs.50,000/- (Rupees Fifty Thousand) from his account. The appellate court noted the account extract of the plaintiff's business firm which record that Rs.4,50,000/- (Rupees Four Lacs Fifty Thousand) was paid to the defendant in cash after withdrawing the amount from the firm. It is then noted that the affidavit of Sanjay Tayade also substantiates the assertion of the plaintiff that Rs.4,50,000/- (Rupees Four Lacs Fifty Thousand) was paid to the defendant in cash.

9. The learned counsel for the petitioner Mr. Gadhia would submit that the discretion exercised by the appellate court is illegal and that the material on record does not justify the grant of injunction. It is submitted that the claim for specific performance is restricted to portion admeasuring 24.75 square meters and that the relief granted is omnibus in nature. It is then submitted that in view of the doctrine of *lis pendens*, which ordinarily would suffice to protect the interest of the plaintiff, rare case will have to be demonstrated in order to successfully obtain relief of temporary injunction. Mr. Gadhia strenuously urged that the agreement to sell and the payment of the alleged earnest and

then the alleged payment of Rs.4,50,000/- (Rupees Four Lacs Fifty Thousand) in cash, are allegations which are seriously disputed and therefore, there is no *prima facie* case made out. It is submitted, with equal vehemence, that in view of the delay in institution of the suit and for that matter in issuing the pre-litigation notice, the discretion ought not to have been exercised in favour of the plaintiff.

10. The learned counsel for the plaintiff Mr. Khapre would rebut the submissions canvassed by Mr. Gadhia, and would, drawing support from the division bench decision in ***Prakash Gobindram Ahuja v. Ganesh Pandharinath Dhonde & ors. 2016(6) Bom.C.R. 262*** would argue that the applicability of Section 52 of the Transfer of Property Act does not fetter the power of the court to grant temporary injunction. Mr. Khapre would argue that there is sufficient material on record to conclude that there is a strong *prima facie* case for grant of specific performance, and if third party right is created in the property, the result would be avoidable complications, multiplicity of litigation and unnecessary harassment to the purchaser of the disputed property.

11. Lest the parties are prejudiced in the trial, I refrain

from minutely evaluating the material on record. However, since certain submissions are canvassed with utmost seriousness and at length, I am impelled to observe that there is sufficient *prima facie* material to hold that the defendant did enter into an agreement to sell portion admeasuring 24.75 square meters along with the construction. The reasoning of the learned appellate court is certainly not perverse. A view, which is absolutely reasonable, is taken on the basis of the material on record and in writ jurisdiction I would be loath to interfere in the exercise of discretion. It is true, as argued by Mr. Gadhia that in a given case the doctrine of *lis pendens* may be a relevant factor. However, in the factual matrix, I notice that the plot is a nazul plot. The partition deed, which according to the plaintiff was not read over to her, is not submitted to the nazul authority for approval, which position is admitted by the learned counsel Mr. Gadhia, in response to a court query. It is not clear whether such a partition by metes and bounds of relatively small piece of land is permissible at all. The involvement of third party rights, in such a situation, will lead to unnecessary complications. Having successfully demonstrated, at least to the appellate court, the existence of a strong *prima facie* case, considering the facts, it will have to be held that the balance of convenience lies in favour of granting an injunction.

12. Mr. Gadhia is however, justified in the submission that the injunction is granted in terms of the prayer clause, which is omnibus in nature. Both the courts below have held the plaintiff to the injunctive relief after arriving at a *prima facie* finding that there is an agreement to sell executed by the petitioner herein. In this view of the matter, the injunction will have to be restricted to the property which is the subject matter of the suit agreement allegedly executed by the parties on 14.08.2018.

13. The petition is partly allowed and it is clarified that the injunction granted by the court below shall be restricted to the subject matter of the alleged agreement to sell dated 28.04.2014.

14. The petition is disposed of in the aforestated terms.

JUDGE

NSN