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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5396 OF 2023

Feroz Khan s/o Murtuza Khan
Age – 52 years, Occ – Business
R/o Nawab Manzil, Kala Darwaza
Aurangabad

PETITIONER

VERSUS

1. Naseruddin Siddiqui s/o Taquiuddin Siddiqui RESPONDENTS
Age – 46 years, Occ – Business
R/o H. No. 1-24-24, Near Azhar Kirana Store
Ganesh Colony, Aurangabad
2. Shakeruddin Siddiqui s/o Taquiuddin Siddiqui
Age – 43 years, Occ – Business
R/o H. No. 1-24-24, Near Azhar Kirana Store
Ganesh Colony, Aurangabad
3. Sajida Masood Shaikh
Age – 64 years, Occ – Business
R/o Plot No. 178/B, Aref Colony,
Aurangabad
4. Shaikh Hanif s/o Shaikh Masood
Age – 39 years, Occ – Business
R/o Plot No. 178/B, Aref Colony,
Aurangabad
5. Shaikh Masood Shaikh Mahboob
Age – 62 years, Occ – Pensioner
R/o Plot No. 178/B, Aref Colony,
Aurangabad

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Mr. N. S. Muthiyan, Advocate for the petitioner
Mr. P. F. Patni, Advocate for respondents No.1 and 2
Mr. T. A. Quadri and Mr. Zia Ul Mustafa, Advocates for
respondents No.3 to 5

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 21st JUNE, 2023
PRONOUNCED ON : 4th AUGUST, 2023

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of learned advocates for the parties.

2. By this petition, filed under Article 227 of the Constitution of India, the petitioner takes exception to the order dated 3rd September, 2022 passed by learned Civil Judge, Senior Division, Aurangabad below Exhibit-47 in Regular Civil Suit No. 1127 of 2022 and the order dated 18th April, 2023 passed by learned District Judge-3, Aurangabad in Miscellaneous Civil Appeal No. 146 of 2022.

3. Brief facts of the matter are that; on 12th June, 1985, Lt. Colonel Syed Badruddin (hereinafter for short "Colonel"), executed agreement to sale in respect of 22000 square feet area of land, in favour of defendants No.1 to 7. Colonel handed over possession of the said 22000 square feet area to defendants No.1 to 7 under possession receipt dated 26th August, 1985. Thereafter, names of defendants No.1 to 7 were recorded in the Property Register (PR) Card on the basis of agreement to sale, in "*other rights*" column.

4. Defendants No.1 to 7 filed Special Civil Suit No. 353 of 1993 against the Colonel and defendants No. 8 to 15 for various reliefs. During the pendency of Special Civil Suit No. 353 of 1993, Colonel, executed agreement to sale in respect of the suit property, in favour of the petitioner – plaintiff, on 11th July, 2010.

5. Special Civil Suit No. 353 of 1993 was decreed on 24th January, 2011 and Colonel was directed to execute agreement to sale in respect of the suit property, in favour of defendants No.1 to 7. Injunction, in respect of portion of 22000 square feet was granted in favour of defendants No.1 to 7.

6. It is claimed that on 23rd March, 2011, Colonel executed a “Will Deed” in favour of Mrs. Niruben Patel. Colonel died issue-less on 30th March, 2011 leaving only wife behind him, i.e. defendant No.8A.

7. Thereafter, defendants No.9 to 15 filed First Appeal No. 1612 of 2011 on 28th June, 2011, challenging the decree passed in Special Civil Suit No. 353 of 1993. Defendant No. 8A - Wife of the Colonel did not challenge the said decree.

8. On 27th July, 2011, this Court granted stay to the decree of specific performance, however, no stay is granted to the

injunction. On 23rd March, 2012, name of Niruben Patel came to be mutated to the suit property, on the basis of the will deed. On 3rd October, 2012, Niruben Patel moved application for cancellation of mutation in her name, stating that the will deed is forged and is prepared after death of the Colonel. On 4th August, 2015, Niruben Patel executed sale deed of the suit property in favour of the plaintiff.

9. On 19th October 2015, defendants No.1 to 7, filed Special Darkhast No. 36 of 2015 against the plaintiff for violation of the injunction decree. On 1st August, 2016, defendants No.1 to 7 lodged FIR against the plaintiff.

10. First Appeal No. 1612 of 2011 came to be transferred to the District Court, Aurangabad, due to enhancement of pecuniary jurisdiction and was registered as Regular Civil Appeal No. 16 of 2017. On 7th January, 2022, the Regular Civil Appeal came to be withdrawn, as the dispute was settled out of the Court.

11. On 23rd February, 2022, defendants No.1 to 7 filed application for execution of sale deed through Court Commissioner. Upon payment of stamp duty on 29th March, 2022, Officer of the Court on 28th April, 2022 executed sale deed

of the suit property, in favour of defendants No.1 to 7. On 30th June, 2022, defendants No.1 to 7 executed sale deed of the suit property in favour of defendants No.16 and 17.

12. The petitioner – original plaintiff filed Regular Civil Suit No. 1127 of 2022 against original defendants No.1 to 15, seeking declaration that sale deed dated 29th March, 2022 is illegal, null and void and it be cancelled and for injunction that the defendants shall not create third party interest in the suit property. During pendency of the said suit, defendants No.1 to 7 sold the suit property to defendants No.16 and 17, who alleged to have illegally dispossessed the plaintiff and sold some portion of the suit property to defendants No.18 to 20. Thereafter, defendants No. 16 to 20 were added as party defendants in the suit. Amendment application seeking appropriate reliefs, against defendants No.16 to 20 is pending before the Trial Court. In view of the change in circumstances, application Exhibit-5 filed by the plaintiff seeking temporary injunction, came to be not pressed. The plaintiff filed application Exhibit-47, seeking injunction restraining respondents No.16 to 20 from changing nature of the suit property or from creating third party interest. The said application was opposed by all the defendants, by filing say. The Trial Court, by order dated 3rd September, 2022, rejected the

application Exhibit-47. The petitioner – plaintiff unsuccessfully challenged the said order, by filing Miscellaneous Civil Appeal No. 146 of 2022. Being aggrieved by both these orders, the petitioner is before this Court.

13. Heard learned advocate for the petitioner, learned advocate for respondents No.1 and 2 and learned advocate for respondents No.3 to 5. Perused the memo of writ petition, documents annexed along with the same, the impugned order and the citations relied on by the learned advocates for the respective parties.

14. Learned advocate for the petitioner argued the matter, as if he was arguing the suit on merits. He urged that both the Courts have failed to appreciate the discrepancies in the draft sale deed as well as in the final sale deed, which came to be executed, so also the fact that the Superintendent, who executed the sale deed was not empowered to execute the document i.e. sale deed dated 29th March, 2022. There is difference in description of the properties mentioned in the schedule of the properties, in the sale deed executed and in the draft sale deed. According to him, no legal or valid decree in Special Civil Suit No. 353 of 1993 is in existence, in view of abatement of the suit in respect of some of the defendants. Further submission is that Colonel executed will

deed in favour of Niruben Patel in respect of the suit property and she being owner, on the basis of will deed, she alone has the right to execute deed of conveyance to anyone. According to him, under Mohammeden law, correct legal position is, bequeath by will in favour of a stranger, to the extent of one third share requires no consent of any legal heir. However, both the courts have erroneously held that will deed in favour of the stranger requires consent of heirs. He submits that Niruben Patel falls within the definition of legal representative, even under section 211 of the Indian Succession Act. According to him, the ground of fraud raised by the petitioner is not considered and both the Courts have failed to consider plaintiff's possession of the suit property, which is evident from the tax receipts, bill of demand, etc. submitted by him on record. According to him, the Appellate Court has erred in coming to the conclusion that the sale deed of the plaintiff is void, as it is hit by the doctrine of *lis pendens*. He submits that, since the decree itself is not enforceable, in law and facts, the doctrine of *lis pendens* would not apply to the facts of the present case. He submits that the Colonel died in 2011 and his legal representatives are not brought on record, therefore, the proceedings of the suit abated. He states that the decree is only passed against the Colonel and in view of his death, since the proceeding abates, therefore, the decree is not

executable and the same is *void ab initio*.

15. He submits that provisions of Order 22, Rule 5 of the Civil Procedure Code are mandatory and since those were not followed, the decree passed in Special Civil Suit No.353 of 1993 has no binding effect. In support of his submissions, he relied on ***"Jaladi Suguna (Deceased) through LRs V/s Satya Sai Central Trust and Others"* (2008) 8 SCC 521.**

16. Per contra, learned advocate for respondents No.1 and 2 supported the impugned orders stating that both the Courts have rightly held that the agreement executed in favour of the plaintiff is hit by the principle of *lis pendens*, as at that time, Special Civil Suit No. 353 of 1993 was pending. He submits that the petitioner ought to have invoked provisions of section 47 and Order 21 Rule 97 of the Civil Procedure Code and no separate suit would be maintainable. Further submission is, admittedly, the decree passed in Special Civil Suit No.353 of 1993 is not challenged by the petitioner, hence, the suit filed by the petitioner is not maintainable. He submits that, at the time of passing the decree in Special Civil Suit No.353 of 1993, Colonel was alive. In First Appeal No. 1227 of 2022, wife of Colonel – defendant No.8A was made party respondent and Niruben Patel was not a party. He further submits that the alleged will,

executed in favour of Niruben Patel, is hit by section 52 of the Transfer of Property Act. According to him, by the will, the entire property was bequeathed by Colonel in favour of Niruben Patel, therefore, consent of the legal heirs of Colonel was necessary. He submits that decision in Special Civil Suit No.353 of 1993 is in favour of defendants No.1 to 7 and not in favour of the petitioner. He, therefore, submits that the suit as is filed by the petitioner itself is not maintainable and both the Courts have rightly refused temporary injunction to the petitioner. In support of his submissions, learned advocate for the respondents has placed reliance on following judgments.

- a. *Usha Sinha V/s Dina Ram and Others” 2008 (5) Mh.L.J. 483*
- b. *“Shivshankara and Another V/s H.P. Vedavyasa Char” 2023 LiveLaw (SC) 261.*
- c. *Decision of the learned Single Judge of this Court in Second appeal No. 0783 of 2016 (Madhav Digambar Shinde V/s The State of Maharashtra and Others)*
- d. *“Lata Construction and Others V/s Dr. Rameshchandra Ramniklal Shah and Another” (2000) 1 SCC 586*
- e. *“N. S. S. Narayana Sarma and Others V/s M/s Goldstone Exports (p) Ltd. And Others” AIR 2002 SC 251*

17. Learned advocate for respondents No.3 to 5 adopted the

arguments of the learned advocate for respondents No.1 and 2. In addition, he submits that since the petitioner has failed to seek declaration of title in the present suit, the suit is not maintainable.

18. In reply, learned advocate for the petitioner submits that since no execution proceeding is pending, therefore, section 47 of the Transfer of Property Act, is not applicable in the present case.

19. Indisputably, in the agreement to sale, executed by Colonel in favour of the petitioner on 11th July, 2010, in clause 9 (c) it is provided that, if the judgment in Special Civil Suit No. 353 of 1993 is not passed in favour of the Vendor and he is unable to execute the sale deed, the vendor is bound to return the earnest money amount to the purchaser without any penalty against the vendor. In this view of the matter, since in Special Civil Suit No. 353 of 1993, the decree is passed in favour of defendants No.1 to 7, the petitioner is not entitled for the relief of interim injunction in his favour.

20. Admittedly, in Special Civil Suit No. 353 of 1993, it is held that possession of the suit property was handed over to the plaintiffs therein i.e. defendants No.1 to 7. Therefore, *prima*

facie, possession of 22000 square feet area is given by Colonel to defendants No.1 to 7. Therefore, the Trial Court has rightly held that the petitioner – plaintiff is not in possession of the suit property “B”.

21. It is claimed by the petitioner – plaintiff that defendants No.1 to 7 have dispossessed him from the suit property after execution of sale deed in their favour. It is, therefore, clear that the plaintiff – petitioner is not in possession of the suit property.

22. Much is argued by the learned advocate for the petitioner about novation / alteration of the contract stating that in view of execution of the memorandum of understanding by defendant Nos. 1 to 7 with the plaintiff, in First Appeal No. 1127 of 2022, there is novation of contract. Said argument is unacceptable in view of the fact that, admittedly, defendant Nos.1 to 7 are claiming that rights of the suit property are conferred to them by virtue of the decree passed in their favour in Regular Civil Suit No. 353 of 1993. In that view of the matter, subsequent understanding and entering into memorandum of understanding by amicable settlement, by way of withdrawing the first appeal, cannot be termed as alteration of original contract. Therefore, there is no substance in the said argument.

23. The petitioner has claimed that by virtue of will deed dated 23rd March, 2011, executed by Colonel in favour of Niruben Patel, entire rights in respect of the property owned by Colonel were conferred on her. In that view of the matter, the submission of learned advocate for the petitioner that since only one third share is allotted to Niruben Patel by Colonel and therefore, consent of his legal heirs was not required, cannot be accepted.

24. Fact remains that as per the decree passed in Special Civil Suit No. 353 of 1993, on 24th January, 2011, Colonel was directed to execute sale deed of 22000 square feet area in favour of defendants No.1 to 7 and the sale deed executed in favour of the petitioner is subsequent to that.

25. The Appellate Court has rightly held that even if ultimately the petitioner is held entitled for decree of possession and even if development is carried out on the suit property during pendency of the suit, then the petitioner would be entitled for possession of the property along with construction, if any and if either of the party chooses to deal with the suit property during pendency of the suit, the same would be governed by section 52 of the Transfer of Property Act. It is also observed that by that time, even the defendants have not prayed for any sanction from the Municipal Authorities.

26. In "*Jaladi Suguna*" (*supra*), the Apex Court has held that, provisions of rules 4 and 5 of Order 22 of the Civil Procedure Code are mandatory. When a respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased respondent and proceed to dispose of the appeal. Nor can it implead all persons claiming to be legal representatives, as parties to the appeal, without deciding who will represent the estate of the deceased and proceed to hear the appeal on merits. Filing of application to bring the legal representatives on record when an LR application is filed, the Court should consider it and decide whether the person named therein as the legal representative should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute.

There cannot be any dispute about the principle laid down in the said ruling, however, the said decision can be distinguished on facts.

27. There appears substance in the argument of the learned

advocate for the petitioner that since no execution is pending, he cannot avail remedy provided under section 47 and Order 21, Rule 97 of the Civil Procedure Code. As such, reliance placed by the learned advocate for the respondents on "**N. S. S. Narayana Sharma**" (*supra*), is misplaced.

28. In "**Lata Constitution**" (*supra*), the Apex Court has held that-

"Section 62 of the Contract Act contains the principle of 'novation' of contract. One of the essential requirements of 'novation' as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract."

Since it is already observed in the foregoing paras that, in the facts of the present case there is no novation of contract, this citation is of no help to the petitioner.

29. In "**Usha Sinha**" (*supra*), doctrine of *lis pendens* is explained by the Apex Court. In "**Shivshankara**" (*supra*) also, doctrine of *lis pendens* is explained and it is held that:

"suit cannot be held to be abated in the event of death of one of the defendants, when the estate / interest was being fully and substantially represented in the suit jointly by the other defendants along with deceased defendant and when they are also his legal representatives. In such cases,

by reason of non-impleadment of all other legal heirs consequential to the death of the said defendant, the defendants could not be heard to contend that the suit should stand abated on account of non substitution of all the other legal representatives of the deceased defendant.”

This ratio supports the case of the respondents.

30. Both the courts have recorded concurrent finding of fact, and, by elaborate judgments, denied the relief to the petitioner. The petitioner has failed to make out a *prima facie* case and the balance of convenience is not in favour of the petitioner. No irreparable loss will be caused to the petitioner, if interim injunction is denied. No illegality or perversity is found in the orders impugned in the present petition. Both the courts have not committed any legal or factual error while passing the impugned orders. The petitioner has failed to make out a case for exercising extraordinary writ jurisdiction. Writ petition, being devoid of merit, is dismissed. Interim relief stands vacated.

31. Needless to state that observations in this judgment are *prima facie* and shall not influence the Trial Court, while deciding the suit on merits.

32. At this stage, learned advocate for petitioner seeks continuation of the interim relief. For the reasons stated in this order, the request is rejected.