

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

WRIT PETITION NO.11142 OF 2019

**SHAIKH MUJIB SHAIKH NANNU AND ANOTHER
VERSUS
LAXMIKANT ASARAMJI MANDHANE AND OTHERS**

...
Advocate for Petitioners : Mr. Ankush N. Nagargoje
Advocate for Respondent Nos. 1 To 4 : Mr. S.G. Dodya
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 02nd AUGUST, 2023

PER COURT :

1. Leave granted to correct the prayer clause.
2. Petitioners are aggrieved by the order dated 30/07/2019, passed by learned Civil Judge, Senior Division, Majalgaon, below Exhibit-25 in Special Civil Suit No.13/2018, thereby partly allowing the application filed by respondents/defendant Nos.1 to 4 for impounding of agreement to sale filed by the petitioner/plaintiff in evidence.
3. The suit is filed by the petitioners/plaintiffs for recovery of earnest amount paid by them to defendants pursuant to the agreement to sale dated 21/11/2017. Defendants appeared and resisted the suit by filing written statement. Defendant Nos.1 to 4, thereafter, filed application Exhibit-25 seeking impounding of the agreement to sale filed by plaintiff in his evidence. By the said

agreement to sale, plot ad-measuring 589 Sq. Mtr. (6338 Sq. feet) was agreed to be sold for consideration at the rate of Rs.1,000/- per Sq. feet. Defendants, therefore, contended that valuation of the disputed plot comes to Rs.63,38,000/- and as per the Bombay Stamp Act, 1958, the stamp duty to be paid is Rs.3,80,280/-. The agreement is executed on the stamp paper of Rs.100/- and as per Sections 32 and 34 of the Bombay Stamp Act, the said agreement to sale is not properly stamped. The said agreement is required to be impounded in terms of Order 13 Rule 8 and it be removed from record.

4. Plaintiffs opposed the application by filing detail say. The Trial Court has allowed the application and impounded the said document. Hence, the present petition.

5. Heard learned advocate for petitioners and learned advocate for respondent Nos.1 to 4. Perused the memo of writ petition, annexures thereto and the impugned order.

6. Perusal of the agreement to sale makes it clear that disputed plot was to be given in possession of the plaintiffs on execution of sale deed. Admittedly, the suit is filed by the plaintiffs for recovery of earnest amount of Rs.10,00,000/- and not for specific performance of agreement to sale. In that view of the matter trial Court has erred in directing impounding of document,

so also, directing petitioners/plaintiffs to pay the deficit stamp duty.

7. Learned advocate for respondent Nos.1 to 4 tried to contend that there is recital in the agreement that prior to the sale deed disputed plot will be measured and boundaries shall be fixed and possession of the same will be handed over to the plaintiffs. It is not possible to accept the said interpretation of the recital in agreement as the recital is that, the property shall be measured prior to the sale deed and boundaries shall be fixed and it will be handed over. That does not mean that possession of the property shall be handed over to the plaintiffs prior to the execution of sale deed. Fact remains that the suit is not filed for specific performance of agreement to sale.

8. In ***Balwantgir Ganpatgir Giri Through his L.Rs. Nanibai wd/o Balwant Giri and Others Vs. Manasi Construction and Developers and Others, 2006 (4) Mh.L.J. 306***, the Division Bench of this Court has held:-

"9. The fact that the agreement in question clearly contemplates delivery of possession only on execution of the sale deed being not in dispute, in fact, that itself is sufficient to reject all the contentions sought to be raised on behalf of the appellants. Besides, as rightly submitted on behalf of the respondents, the Explanation to Article 25, the delivery of possession which transposes an agreement into a conveyance in terms of the said Explanation is only in case of agreement to deliver the possession in terms of the agreement and not in terms of the sale deed agreed to be executed consequent to such agreement. Indeed, in case of execution of the sale deed it would carry the stamp duty which is required to be paid on a conveyance in accordance with the Article 25 of Schedule-I. Being so, once the sale

deed is executed by paying required stamp duty in terms of Article 25, the occasion to deprive the Government revenue cannot arise. For the said reason, once the agreement discloses that delivery would be on execution of the sale deed, it is needless to say that there could be no opportunity for the parties to defraud the Government. Being so, an agreement which restricts delivery of possession on execution of the sale deed cannot be by any stretch of imagination construed to be a conveyance within the meaning of the said expression under Explanation-I to Article 25 of Schedule-I of the said Act.”

9. In the light of the aforesaid ratio also order passed by the Trial Court is unsustainable in law and facts of the present case.

In the result, following order:-

ORDER

- (I) Writ petition is allowed.
- (II) Impugned order dated 30/07/2019, passed by learned Civil Judge, Senior Division, Majalgaon, below Exhibit-25 in Special Civil Suit No.13/2018, is quashed and set aside. Application Exhibit-25 is rejected.

(NITIN B. SURYAWANSHI, J.)