IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7101 OF 2022

Ababeel Foam Pvt. Ltd. and Ors. ... Petitioners
Versus
Shivanshu Sintered Products Pvt. Ltd. and Ors. ... Respondents

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Mr. S.P. Rajepandhare for the Petitioners.
Mr. Anand S. Kulkarni, for the Respondent Nos.4 to 6.

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : June 22, 2023.

P. C. :

1. Heard.

2. By this petition, the challenge is to the order dated 5th May, 2022 passed by the learned District Judge-4, Solapur in Misc. Civil Appeal No.20 of 2022 below Exh.16 reversing the order of the Trial Court passed below Exhibit "5".

3. Special Civil Suit No.244 of 2020 came to be instituted by the petitioners seeking specific performance of the agreement styled as "Earnest Money Receipt" dated 26th November, 2019 in respect of the property being Block No.345/2 situated at village Boramani,

Taluka South Solapur, District Solapur. and in the alternative for refund of earnest money.

4. The case of the petitioner-plaintiffs is that the suit land was agreed to be sold by the Respondent Nos.1 to 3 to the Petitioners for a total consideration of Rs.1,47,00,000/- as against which, a sum of Rs.5,00,000/- was paid by way of an earnest money on 25th November, 2019. It is averred in the plaint that the Petitioners were always ready and willing to pay the balance consideration amount and to complete the sale transaction, however, due to non-fulfillment of the obligation of the Respondent nos.1 to 3 to clear the dues and to provide the documents led to the non execution of the sale deed. Armed with this case, the Petitioners filed the special civil suit seeking a direction to the Respondent Nos.1 to 3 to execute the sale deed of the suit land in favour of the Petitioners by accepting the remaining balance amount of consideration. In these proceedings, an application under Exh.5 came to be filed seeking injunction restraining the Respondent Nos.4 to 6, who are the subsequent purchasers of the suit property, by virtue of a deed executed on 19th August, 2020, from creating any third party interest and from creating any charge on the suit land, which was allowed by the trial Court.

5. Aggrieved by the restraining orders, the Respondent Nos.1 to 3 approached the Appellate Court which reversed the findings of the trial Court by its judgment and order dated 5th May, 2022, as such, this petition.

6. Heard Mr. S.P. Rajepandhare, learned counsel for the Petitioner and Mr. Anand S. Kulkarni, learned counsel for the Respondent Nos.4 to 6.

7. Mr. Rajepandhare, submits that as per the terms of notarized unregistered agreement dated 26th November, 2019, prior to the execution of the sale deed, the Respondent Nos.1 to 3 had undertaken to clear all the dues pending against the said property within two months from the date of the receipt of the advance payment and it was agreed that the number of days that may delay the final execution of sale deed due to non submission or incomplete submission of paperwork related to the said property and required for title documents transfer from seller end will not be counted in two months time period. He would submit that the correspondence on record sufficiently establishes that the documentation was not completed and as such, the final execution of the sale deed was

delayed by the Respondent Nos.1 to 3. He has invited the attention of this Court to the public notice which was issued by the Petitioners pursuant to the agreement of sale as well as the whatsapp message, which is annexed at page 23 of the petition.

8. It is his submission that the termination of the agreement and the forfeiture of the earnest money vide notice dated 3rd March, 2020 was in violation of the terms of the contract, inasmuch as, the Petitioners were ready and willing to fulfill their part of the contract and it was the Respondent Nos.1 to 3 who were in breach on account of the non-clearance of the dues and non-submission of the documents. He has assailed the findings of the Appellate Court and submits that on proper appreciation of the material on record the trial Court has rightly come to a finding that the performance of agreement was expected of the defendants and that the Plaintiffs were and are always ready and willing to perform their part of contract. He submits that Respondent Nos. 4 to 6 are not *bonafide* purchasers for valuable consideration in as much as the forfeiture notice was sent on 3rd March, 2020 and the earnest money of Rs.30,00,000/- was paid on 17th February, 2020, 29th February, 2020 and 4th March, 2020.

9. Per contra, learned counsel for the Respondent Nos.4 to 6 submits that the public notice as regards the proposed sale was issued on 17th February, 2020 and no objection to the proposed sale was received by the Respondent Nos.4 to 6. He would further contend that as the agreement stood terminated by the notice dated 3rd March, 2020, the Respondent Nos.4 to 6 were justified in entering into the sale deed on 19th August, 2020. He has pointed out to this Court the sanction letter, based on which the learned counsel for the Petitioners contends that the Petitioners had the financial ability to complete the financial liability, and, would contend that the sanction letter is dated 3rd March, 2020 subsequent to the cancellation of the contract. He submits that the Respondent Nos.4 to 6 had no previous notice of the agreement between the Petitioners and the Respondent Nos.1 to 3.

10. In rejoinder, learned counsel for Petitioners submits that the Petitioners would be put to irreparable loss in event restraining orders are not passed as the property in question is mortgaged with bank and in event the Petitioners succeed in the proceedings, the property in question would be burdened with financial liability.

11. Considered the submissions of the learned counsel for the

parties.

12. The Petitioners have come with a case that there is breach of contract on part of the Respondent Nos.1 to 3 and the Petitioners being ready and willing to perform their part of the contract, were entitled to claim specific performance of the agreement. In that context, if we look at the terms of the unregistered agreement dated 26th November, 2019, the vendors therein had agreed to clear all the dues and to complete all the paper work within a period of two months. The entire sale transaction as per the terms of the unregistered deed was required to be completed within a period of two months and the period taken by the vendor therein to clear the dues and to complete the paper work was to be deleted from the computation of period of two months. The agreement does not specify the documents which are required to be furnished for completion of the sale deed. Apart from the whatsapp message dated 11th January, 2020 and 12th February, 2020 there is a communication dated 15th January, 2020 calling upon the Respondent Nos.1 to 3 to furnish certain documents. However, there is no material on record to demonstrate that there were any dues pending against the said property, which delayed the execution of the sale deed. As also the

contention that there was incomplete submission of the paper work, appears to be based on the communication which is annexed at page 24 of the petition. From the perusal of the communication, the documents sought were NA order copy; blue print of construction drawing; and construction permission copy. Learned counsel appearing for the Petitioners has been unable to demonstrate that for failure to furnish the above three documents, the sale deed could not executed between the parties. As regards the financial ability, the learned counsel for the Respondents Nos.4 to 6 have rightly pointed out the sanction letter which shows the sanction of the credit facility on 21st March, 2020.

13. Considering the documents which were sought by the Petitioners it cannot be said that for want of these documents the sale deed could not be executed. The fact remains that the Petitioners could obtain the sanction only on 21st March, 2020, and thus it cannot be said that *prima facie*, the Petitioners were ready and willing to perform their part of the contract.

13. By communication dated 3rd March, 2020, there was a notice of termination of the contract and the forfeiture of the earnest

money. The Petitioners were well aware about the termination as is reflected from paragraph 11 of the plaint and inspite of the termination of the contract, the Petitioners have failed to challenge the termination.. The Appellate Court while reversing the findings of the trial Court has relied upon the decision of the Apex Court, in the case of ***I.S. Sikandar (D) By Lr's Vs. K. Subramani and Ors.*** in ***Civil Appeal No. 7306/2013 (arising out of SLP (C) No.20367 of 2009)*** decided on 29th August, 2023. Paragraph no.16 of the decision, which reads thus:

> *"16. During argument advocate for defendants No. 4 to 6 relied upon a case Civil appeal No. 7306/2013 (arising out of SLP © No. 20367 of 2009) reported in I. S. Sikandar (D) by Lr's V/s. K. Subramani and Ors. Decided on 29th August 2013. In the said case Hon'ble Lordship pleased to hold that, "since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the plaintiff and defendant Nos. 1-4 w.e.f. 10.04.1985. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of sale as bad in law. In the absence of such prayer by the plaintiff the original suit*

> *filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of agreement of sale and consequential relief of decree for permanent injunction is not maintainable in law.”*

14. The contention of the learned counsel for the Petitioners to counter this position is that an application for amendment has been filed. It is to be noted that the suit was filed in the year 2020 and the application for amendment has been filed in the year 2022, which is still pending and no orders are obtained thereon. Without amending the plaint, an application for injunction was filed and decided by the trial Court without taking into consideration the fact that injunction is sought without seeking the relief to declare the termination as bad in law and as such the suit filed was not maintainable. The trial Court also failed to take into consideration the fact that the Respondent Nos.4 to 6 were *bonafide* purchasers for value without notice inasmuch as, the contract was entered into between the Respondent Nos.1 to 3 with the Respondent Nos.4 to 6 on 19th August, 2020, after the contract was terminated on 3rd March, 2020. The public notice in respect of the proposed sale was issued by the Respondent Nos.4 to 6 to which they did not receive any objection. Further the “earnest

money receipt" was a notarized agreement and not registered and hence even if search is taken in the Sub-Registrar's office, the same would not have yielded any result. It is nobody's case that there was no due diligence on part of the Respondent Nos.4 to 6. As such it can be said that *prima facie* the Respondent Nos.4 to 6 are *bonafide* purchasers for value without notice. That being so the restraining orders will cause irreparable loss to the Respondent Nos.4 to 6. The fact remains that the termination notice was issued on 3rd March, 2020 and the sale deed was executed between the parties on 19th August, 2020. The suit was filed by the Petitioners on 1st October, 2020.

15. The validity of the termination not having been questioned in the proceedings instituted by the Petitioners, in my opinion, the relief of injunction could not have been sought as against the *bonafide* purchasers for value without notice.

16. Apart from the fact that *prima facie*, the suit was not maintainable without challenge to the termination, it is to be noted that the Respondent Nos.4 to 6 have parted with valuable consideration of almost Rs.1,80,00,000/-, as against the earnest money of Rs.5,00,000/-. It is settled that in a suit for specific performance

alternate relief of damage and compensation can be claimed. While deciding the application for interim relief, the Court has to consider *prima facie* case, balance of convenience and irreparable loss. In the present case, it is clear that as far as the Respondent Nos.4 to 6 are concerned, they are *bonafide* purchasers for value without notice. The Petitioners have failed to make out a *prima facie* case of breach of contract by the Respondent Nos.1 to 3 as the Petitioners have failed to show that in the absence of the documents sought in the communication of 15th January, 2020, the sale deed could not be executed. It is *prima facie* evident from the terms of the agreement that the balance payment had to be made within period of two months which was admittedly not done. The agreement itself provides for forfeiture of the earnest money and cancellation of the agreement upon failure to pay the balance consideration within the stipulated period. The Respondent Nos.4 to 6 have taken possession of the property and in event the Respondent Nos.4 to 6 are restrained from creating any charge on the property, the same will hamper the purpose of purchase of this property i.e. the construction of a factory as submitted by the learned counsel for the Respondent Nos.4 to 6..

17. In light of the above, the Petition is devoid of merits and

stands dismissed

18. At this stage, learned counsel for the Petitioners seeks stay of this order for a period of eight weeks. In the interest of justice, the present order is stayed for a period of eight weeks.

(Sharmila U. Deshmukh, J.)

19. Later on at 2:30 p.m., the matter was again mentioned and learned counsel for the petitioners seeks extension of the relief granted by this Court on 17th June, 2023 which is opposed by the learned counsel appearing for the respondents stating that the respondents have invested huge amount and as such would be gravely prejudiced. Considering that this Court has continued the effect of the interim order of the Appellant since 17th June, 2022, the same is extended for further period of eight weeks.

(Sharmila U. Deshmukh, J.)