

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

**APPEAL FROM ORDER NO.262 OF 2023
WITH
INTERIM APPLICATION NO.3513 OF 2023**

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Trinity Wisdowm Education Welfare
and Cultural Society

...Appellant

vs.

Nitin Gajanan Mhatre and Another

...Respondents

Mr. Mandar Limaye a/w. Mr. Saurabh Oka, for the Appellant.
Mr. Dushyant Pagare, for the Respondents.

CORAM : N. J. JAMADAR, J.

DATE : APRIL 12, 2023

P.C.:

1. This appeal is directed against an order passed on an application for temporary injunction seeking to restrain the defendants from creating third interest in the agricultural land situated at village Khidkali, Taluka and District Thane described in paragraph 4 of the plaint (the suit property) whereby the application came to be rejected.

2. The plaintiff is a society registered under the Societies Act, 1860. The plaintiff is primarily engaged in the activities of setting up, managing and running schools under the name and style of Delhi Public School. The defendant Nos. 1 and 2 approached the plaintiff and represented that the defendant No. 1 is the sole and

exclusive owner and possessor of and/or otherwise well and sufficiently entitled to the suit property. The defendants made further representation that the suit property would be ideal for establishing of school in the locality where the suit property is situated.

3. Based on the representations made by the defendant Nos. 1 and 2, the plaintiff agreed to purchase the suit property for a consideration of Rs. 6 Crores. The terms of understanding were finalized. As the defendant insisted for payment of major part of consideration prior to be the execution of agreement for sale, the plaintiff claimed to have parted with a sum of Rs. 5.50 Crores through the banking channels. Eventually, an agreement for sale came to be executed by and between the defendant No. 1 and plaintiff on 21st October, 2020.

4. The plaintiff asserts that there was resistance to the survey of suit property by the local villagers. Eventually, a Deed of Confirmation came to be executed on 21st June, 2021 with the local villagers, who were causing obstruction. Upon survey, it was found that four plots of land forming the suit property were not contiguous, and were disjointed. Neither was there any access road

connecting to any of the four plots.

5. The plaintiff thus addressed a letter to the defendant on 17th July, 2021. In the reply dated 28th July, 2021 the defendants raised false and frivolous defences. Since the plaintiff had parted with a huge consideration, the plaintiff called upon the defendants to execute the conveyance though the suit property did not fully suit their purpose. The defendants failed and neglected to execute the sale deed. Hence, the plaintiff was constrained to institute the suit seeking a declaration that the suit agreement dated 21st October, 2020 executed between the plaintiff and defendant No. 1 is legal, valid and subsisting and a decree for specific performance of the suit agreement.

6. In the said suit, the plaintiff filed an application for temporary injunction seeking to restrain the defendants and/or their agents, assigns from transferring, disposing of, encumbering or creating third party interest or otherwise dealing with suit property.

7. The defendants resisted the application. It was contended that the plaintiff suppressed the true facts. According to the defendants the consideration was fixed at Rs. 9 Crores. A Memorandum of

Understanding dated 15th May, 2019 (MOU) was allegedly executed between the parties wherein the true terms of the transactions were incorporated. The defendant No. 1 was allegedly coerced to execute the agreement of sale in which the consideration was shown Rs. 6 Crores. The defendants contended that in the reply dated 28th February, 2022 they had shown readiness and willingness to execute a Sale Deed on the terms agreed between the parties. It was contended that since the plaintiff had issued a notice of cancellation of the agreement for sale, the plaintiff cannot seek specific performance of the said agreement. Denying that the plaintiff has made out a prima facie case, the defendants prayed for rejection of the application.

8. By the impugned order, the learned Civil Judge was persuaded to reject the application holding, inter alia, that the plaintiff failed to make out a prima facie case. Non production of MOU was arrayed against the plaintiff. The fact that the plaintiff had terminated the agreement vide notice dated 17th July, 2021 was held to disentitle the plaintiff from claiming the interim relief. It was further found that there was no apprehension of disposition of the property as the defendants had shown readiness and willingness to complete the transaction.

9. Being aggrieved the plaintiff is in appeal.

10. I have heard Mr. Mandar Limaye, the learned counsel for the appellant and Mr. Dushyant Pagare, learned counsel for the Respondents.

11. Mr. Limaye would urge that the fact that the plaintiff has parted with a huge consideration of Rs. 5.50 Crores is incontestible. The said amount constitutes more than 90% of the consideration in accordance with the terms of agreement to sale, over the execution of which there is no dispute. In the circumstances, the learned trial Court committed an error in refusing to grant temporary injunction on the premise that there was MOU between the parties which was not placed on record. Mr. Limaye would urge that the trial Court misdirected itself in holding that there was no apprehension of disposition of the suit property.

12. The nature of the suit assumes significance. The plaintiff approached the Court for a declaration that the suit agreement dated 21st October, 2020 is legal and valid and for a decree of specific performance of the said suit agreement. This would imply that the plaintiff was considering the contract valid and subsisting.

It is only when a party has not repudiated the contract and is ready and willing to perform its part of the contract, according to its true terms, the equitable relief of specific performance can be sought. It would be a contradiction in terms, for a party to repudiate the contract at one breath and seek its specific performance, at another breath.

13. In the case at hand, in the plaint itself, the plaintiff asserted that on 17th July, 2021 it had addressed a letter to the defendants and cancelled the agreement for sale. Mr. Limaye, the learned counsel for the appellant tendered a copy of the said letter dated 17th July, 2021 for the perusal of the Court. The said letter dated 17th July, 2021, after ascribing reasons, categorically records that the plaintiff was unable to proceed further with the transaction. The defendant No. 1 was called upon to refund the entire amount and thereupon the agreement for sale would stand cancelled. In fact, the subject of the letter was captioned as “cancellation of the deed to purchase the land”.

14. The aforesaid letter would thus indicate that the plaintiff had plainly and unequivocally repudiated the contract. The necessary corollary is that the plaintiff has not been ready and willing to

perform its part of the contract. In this view of the matter, the learned Civil Judge was justified in drawing an inference that the there was no prima facie case as the plaintiff had repudiated the contract.

15. Mr. Limaye, the learned counsel for the appellant attempted to salvage the position by inviting the attention of the Court to the observations in paragraphs 12 and 13 of the plaint where the plaintiff explained the circumstances in which the said letter was addressed.

16. I am afraid the pleadings in paragraphs 12 and 13 of the plaint are of any assistance to the plaintiff. It is not the case that after the repudiation of the contract there were further negotiations between the plaintiff and defendants and the parties continued to be ad-idem with regard to the terms of the contract incorporated in the agreement for sale.

17. The situation which thus obtains is that in view of the repudiation of the contract by the plaintiff, prima facie, the tenability of the suit for declaration that the said agreement for sale is legal, valid and subsisting and for specific performance of the

contract contained therein becomes suspect.

18. It would be contextually relevant to note there is no prayer for refund of the amount paid by the plaintiff. In the event of specific performance not being granted, the plaintiff prayed for damages. Undoubtedly, the plaintiff can claim refund of consideration at any stage of suit. As and when such a refund is claimed, the plaintiff may seek interim measure to secure the said amount. However, having prima facie repudiated the contract, the plaintiff cannot seek specific performance and interim reliefs in aid thereof.

19. In this view of the matter, the learned Civil Judge did not commit any error in recording a finding that there was no prima face case. Thus, no interference is warranted in exercise of appellate jurisdiction against a discretionary order.

Hence, the following order.

ORDER

1] The appeal stands dismissed.

2] In view of the dismissal of the appeal, the Interim Application also stands dismissed.

(N. J. JAMADAR, J.)