

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

**APPEAL FROM ORDER NO.676 OF 2023
WITH
INTERIM APPLICATION NO.15142 OF 2023**

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Mrs. Anushree Anil Pilvankar & Anr. ..Appellants

Versus

Mr. Imtiyaz Abubakar Rajapkar ..Respondent

Mr. Aseem Naphade a/w Deepak Chitnis, Abhilash Chitre & Sonali Dalvi i/by Deepak Chitnis-Chiparikar, for the Appellants.

Mr. Amardev Uniyal a/w B. L. Mangale & Anand Oka, for the Respondent.

CORAM : SANDEEP V. MARNE, J.

DATE : 30th NOVEMBER, 2023

PC.

1. By this appeal, appellants challenge order dated 2nd March, 2023 passed by City Civil Court rejecting Notice of Motion No.2686 of 2021 filed for seeking temporary injunction to restrain defendant from interfering with plaintiffs' possession of suit flat and to restrain defendant from creating any third party rights during pendency of the suit.

2. Plaintiffs have instituted SC Suit No.1825 of 2021 for specific performance of the Memorandum of Understanding (MOU) dated 1st January, 2019. By that MOU, the defendant agreed to sale suit flat to the plaintiffs for consideration of Rs.64,50,000/-. Out of

agreed amount of consideration, plaintiffs paid an amount of Rs.5,00,000/- on the date of execution of the MOU and agreed to pay the balance amount on or before 31st March, 2019. Clause (3) of the MOU mandated defendant to first obtain Succession Certificate. The MOU further provides that on receipt of balance payment the defendant shall hand over possession of the suit flat to the plaintiffs.

3. It appears that in pursuance of the MOU dated 1st January, 2019, plaintiffs have paid total amount of Rs.25,00,000/- to the defendant. Plaintiffs also claim that an additional amount of Rs.1,50,000/- has been paid to the defendant in cash which is disputed by the defendant.

4. It appears that what was required to be obtained in terms of clause (3) of the MOU is not a Succession Certificate but Letters of Administration. The Letters of Administration were issued in favour of the defendant by this Court on 19th July, 2019. However, it appears that plaintiffs did not pay the balance amount of consideration. Since the defendant showed unwillingness to act as per the MOU, the plaintiffs addressed notice dated 2nd February, 2020 calling upon defendant to complete sale transaction in accordance with the MOU. In the meantime, it appears that an agreement for Leave and Licence came to be executed in the name of husband of plaintiff No.1 on 30th March, 2019 for a period from 1st April, 2019 to 29th February, 2020 on payment of licence fees of

Rs.15,000/- per month and interest free deposit on Rs.50,000/-. It also appears that the building has been demolished for redevelopment. It is plaintiffs' case that the defendant is deliberately avoiding to complete the sale transaction on account of benefits arising out the redevelopment of the building. Plaintiffs have accordingly instituted SC Suit No.1825 of 2021 for specific performance of MOU dated 1st January, 2019. Notice of Motion No.2686 of 2021 filed by the plaintiffs seeking temporary injunction has been dismissed vide order dated 2nd March, 2023, which is subject matter of challenge in the present appeal.

5. Mr. Naphade, the learned counsel appearing for the appellants would submit that MOU envisaged obtaining of Succession Certificate as a pre-condition for completion of the sale transaction. According to him, unless the defendant perfected his title by obtaining the Succession Certificate, the transaction could not be taken forward. He would claim that clause (3) of the MOU is worded in such a fashion that without obtaining Succession Certificate, the balance amount of consideration was not payable. Mr. Naphade would further submit that subsequently it was discovered that what was required to be obtained was Letters of Administration. That though the Letters of Administration was issued in favour of the defendant on 19th July, 2019, the same contains a specific covenant that the defendant cannot sell the suit flat without prior permission of this Court. Mr. Naphade also placed reliance on the MHADA's letter dated 30th December, 2019, which

also prohibits sale of the flat without obtaining prior permission of this Court. According to Mr. Naphade, since defendant has failed to obtain prior permission of this Court for sale of the flat, he is yet to perfect his title and that therefore the time for performance of contract on the part of plaintiffs by paying the balance amount for consideration was yet to arrive. Plaintiffs were always ready and willing to perform their part of consideration by paying balance amount of consideration. In support of this contention, he would rely on the judgment of Apex Court in the matter of ***Saradamani Kandappan Vs. S. Rajalakshmi & Ors.*** reported in ***(2011) 12 SCC 18.***

6. Per contra, Mr. Uniyal, the learned counsel appearing for the respondent/defendant would oppose the appeal and support the order passed by the City Civil Court. He would submit that the defendant had agreed to sale the flat on account of financial difficulties faced by him. By considering the dire condition of the defendant, plaintiffs had agreed to purchase the suit flat by paying entire amount of consideration on or before 31st March, 2019. That the plaintiffs deliberately avoided to pay the agreed amount of consideration and delayed the completion of transaction even after issuance of Letters of Administration by this Court. That plaintiffs neither had intention nor the financial capacity to complete the sale transaction. That therefore the City Civil Court has rightly refused discretionary relief of temporary injunction in favour of the plaintiffs.

7. I have considered the submissions canvassed by learned counsels appearing for the parties.

8. It is Mr. Naphade's contention that without the defendant perfecting his title, the sale transaction could not be completed and that the plaintiffs obligation to pay balance amount of consideration was completely dependent upon the defendant's perfection of title. Reliance is placed on provisions of Section 52 of the Contract Act. Mr. Naphade has also relied upon the Apex Court judgment in ***Saradamani Kandappan*** (*supra*), in which the Apex Court has held in paragraph 50 as under :-

50. Section 52 relates to the order of performance of reciprocal promises. It provides that:

“52. Order of performance of reciprocal promises.- Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.”

Let us illustrate with reference to an agreement of sale which provides that the vendor shall make out to the satisfaction of the purchaser a good, marketable and subsisting title and provide all documents as required by the purchaser to satisfy him about the title of the vendor; that the vendor shall obtain a certificate of clearance from a specified authority for the sale, that the sale shall be completed within a period of four months of receipt of the clearance certificate and the purchaser shall pay the balance sale price at the time of registration of the sale. It is evident

that the vendor will have first to make out a title by producing the documents required by the purchaser and also obtain the clearance certificate. Only thereafter the sale deed shall have to be executed and payment of the sale consideration will have to be made at the time of registration of the sale deed. The vendor cannot seek payment of the balance sale price without performing his obligations as per the agreement.

9. There is no dispute to the proposition that if the order in which the reciprocal promises are expressly fixed by the contract, they must be performed in that order alone. In the present case, perusal of clause (3) of the MOU would indicate that the condition stipulated therein was for obtaining a Succession Certificate. Clause (3) of the MOU reads thus :-

“3. That the Party of the First Part herein shall obtain the SUCCESSION CERTIFICATE from the concerned authorities at his own cost and on receipt of the balance payment, the Party of the First Part shall handover the vacant and peaceful possession of the above said Room to the Party of the Second Part without fail and shall clear all charges, taxes, etc. in respect of the above said Room upto the date of handing over the possession of the said Room to the Party of the Second Party.”

10. Therefore, if clause (3) of the MOU is to be strictly construed, the same stipulates condition of obtaining a Succession Certificate, which, in the facts and circumstances of the case, is admittedly not required. It appears that the defendant was required to obtain Letters of Administration which has been issued by this Court on 19th July, 2019. There is nothing on record to indicate that

after issuance of Letters of Administration by this Court on 19th July, 2019, plaintiffs immediately wrote the defendant to complete the sale transaction by showing willingness to pay balance amount of consideration. The condition in the Letters of Administration for obtaining prior permission of the High Court now sought to be relied upon by the plaintiffs appears to be completely afterthought. In this regard, paragraph 4 of the letter dated 2nd February, 2020 addressed on behalf of the plaintiffs reads thus :-

*“4. In consonance with the term and condition no.3 of the Memorandum of Understanding dated 1st January, 2019, you obtained Succession Certificate dated 19th July, 2019 from High Court of Judicature, Mumbai, in Petition no. 875/2019 and also obtained a letter from MHADA, in respect of the said **Flat No.1238**, in Building no.52, Ground Floor, Kannamvar Nagar no.1, Vikhroli (East), Mumbai – 400 083, appointing you as an Administrator of the said room (subject to certain terms and conditions) which was previously in the name of your mother **Aminabi**. Thus as per the said condition No.3, on receipt of the balance amount you were duty-bound to hand over the vacant and peaceful possession of the said room to my clients, without fail and to clear all the charges, taxes etc. in respect of the said room up-to the date of handing over the possession of the said room to my clients. However, you have turned volte-face, you have backed out from the terms of MOU and you have refused to complete the deal for surreptitious motive.”*

11. Even in the letter dated 2nd February, 2020, the plaintiffs did not call upon the defendant to obtain prior permission of the High Court for completion of the sale transaction. Considering the conduct exhibited by the plaintiffs, it is difficult to hold that the

plaintiffs were ready or willing to complete the sale transaction. A MOU was executed on 1st January, 2019 and by now the period of almost five long years has elapsed. Plaintiffs cannot be permitted to block the flat of the defendant by paying only part consideration of Rs.25,00,000/-. Considering the facts and circumstances of the present case, the City Civil Court has rightly refused the discretionary relief of temporary injunction. The defendant appears to have made a statement in the written statement that he does not want to sale flat on account of sentimental value attached to the same. As of now, the building in which the suit flat was located has been demolished and new building is being constructed at the site. It is not known as to how much time would be required for construction of the new building and for handing over possession of the permanent alternate accommodation to the defendant. In that view of the matter, no restraint order can be clamped against the defendant. No error can be traced in the order passed by the City Civil Court,

12. The appeal, being devoid of merits, is dismissed.

13. Needless to state that the City Civil Court shall decide the suit on its own merits without being influenced by any of the observations made in the present order. Pending interim application also stands disposed of.

[SANDEEP V. MARNE, J.]