

Nikita

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

**APPEAL FROM ORDER NO.488 OF 2018
WITH
CIVIL APPLICATION NO.641 OF 2018
IN
APPEAL FROM ORDER NO.488 OF 2018**

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Shyamsundar Radheshyam Agarwal ... Appellant
V/s.
Dinanath Sadashiv Gawade & Ors ... Respondents

Mr. Girish S. Godbole, Sr. Advocate, a/w Mr. Atharva Dandekar, for the Appellant.

Mr. Godbole, Sr. Adv. i/b Ms. Shruti Tulpule, and Mr. Atharva Dandekar for Respondent Nos.1 & 2.

Ms. Shivani Samel for Respondent No.3.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 25, 2023

P.C.:

1. The challenge in this appeal is to the order dated 11th April 2018 rejecting the application for temporary injunction restraining defendants from creating third-party rights in a suit for specific performance.

2. The plaintiff filed suit for specific performance based on a memorandum of understanding dated 24 November 2002 and an agreement dated 25th January 2004. According to the terms of the agreement, initially, the defendant/appellant was required to pay

the total amount of Rs.1.66 crore towards consideration of the property described in the agreement dated 24th November 2002. By subsequent agreement dated 25th January 2004, the subject matter of the property was reduced to half and accordingly, consideration was reduced to Rs.1,21,22,435/-. The plaintiff has paid Rs.16,00,000/- towards part consideration. According to the plaintiff, the agreements cast an obligation on both sides, and unless the defendant performs his part of the contract, the plaintiff was not supposed to pay the balance amount of consideration and, therefore, ultimately, he filed suit in the year 2016 seeking specific performance of both the agreements.

3. In the said suit, the plaintiff filed an application for temporary injunction. The Trial Court rejected the temporary injunction application based on the findings that the material on record does not indicate readiness and willingness on the part of the plaintiff. Though the Trial Court recorded a finding of limitation while adjudicating on the issue of limitation under Section 9(a) in favour of the plaintiff, delay and laches in filing suit dis-entitles plaintiff from grant of temporary relief.

4. Mr. Patil, learned advocate for the appellants, submitted that both the agreements cast reciprocal obligations on the parties. In the absence of the performance of obligation by the defendants, the plaintiff was not required to pay balance consideration. According to him, the obligations the defendant had to fulfil were getting permission from ULC authorities and obtaining probate. The plaintiff did not know such probate; therefore, relief could not have been denied on the grounds of delay/laches in filing suit for

specific performance. He submitted that the suit is at an advanced stage as evidence of the plaintiff is going on and, therefore, the ad-interim relief is in force from the date of filing of the suit and deserves to be continued.

5. Per contra, Mr. Godbole, learned Senior Advocate for Defendant No.1, submitted that except for payment of Rs.16,00,000/- before 2004 till the filing of the suit, i.e. still 2016, no amount is paid by the plaintiff. After the repeal of the Urban Land (Ceiling and Regulation) Repeal Act 2007, the plaintiff needed to take steps to seek specific performance. He submitted that in 2011, third-party rights were created by virtue of a development agreement, which came to be registered in 2012. The will in favour of defendant No.1 is a registered Will, and probate of the said will was granted in the year 2010. The plaintiff has miserably failed to show readiness and willingness for his part of the contract, and a delay of 12 years in filing the suit from the date of agreement cannot be construed as a reasonable period for filing suit for specific performance.

6. Having considered averments on behalf of both sides, the following factual scenario emerges:

- a) On 24th November 2002, the first memorandum of understanding was executed by paying the amount of Rs.10,00,000/-;
- b) On 25th January 2004, a second agreement reducing area and amount by half was executed. An amount of Rs.6,00,000/- was paid towards consideration. The total consideration to be paid is

Rs.1,21,22,435/-;

c) As per the agreement, the obligation to get permission from ULC authorities was on defendant No.1; however, the Urban Land (Ceiling and Regulation) Act, 1976, was repealed with effect from 29th November 2007. Defendants obtained probate of will.

d) On 17th June 2016, the suit was filed.

7. At this stage, it is necessary to consider the judgment of the Apex Court in the case of **K.S. Vaidyanadam & Ors v. Vairavan**, reported in (1997) 3 SCC page 1. In the facts of the case before the Apex Court, an agreement to sell was executed on 15th December 1978 for consideration of Rs.60,000/-. The plaintiff paid an earnest amount of Rs.5,000/-. Though the agreement stipulated six months, the plaintiff had to purchase stamp paper and tender balance amount of consideration. On 11th July 1998, notice was issued after two and a half years of the date of the agreement. The Apex Court held that in case of an agreement of sale relating to immovable property, time is not the essence of the contract unless expressly provided to that effect. It is held that it does not follow that any and every suit for specific performance where time is not the essence of the contract should be decreed provided the suit is filed within limitation notwithstanding the time limits stipulated in the agreement for doing one or other thing. It is held that the plaintiff must perform his part of the contract within reasonable time, and reasonable time should be determined by looking at all surrounding circumstances, including express terms of the contract and the nature of the property. It is held that total inaction on the

part of the plaintiff for two and a half years in clear violation of a term of the agreement and the delay coupled with a substantial rise in prices would render the grant of specific performance inequitable.

8. In the facts of the case, the first MOU was on 24th January 2002, and the second agreement was on 25th January 2004. The suit was filed in the year 2016. Though clause 12 of the first MOU states that obtaining requisite permission from authorities shall be a precondition for payment of further consideration, such clause can not be construed to grant 12 years to the plaintiff to file suit for specific performance. The reasonable period for filing suit for specific performance needs to be construed based on conditions agreed by the parties. The condition of getting permission from ULC authorities lost its significance after the repeal of the Act on 29th November 2007. At least within three years from the date of repeal of the Act, the plaintiff ought to have filed the suit.

9. Moreover, in the facts of the case, by development agreement, Defendant No.1 created third-party rights by agreement registered in 2012; still, the suit appears to have been filed on 17th June 2016.

10. Moreover, this is not a case where substantial consideration is paid by the plaintiff or possession of the property is delivered to the plaintiff. However, having paid less than 20% of the consideration, the suit having filed after 12 years of MOU, creation of third-party rights four years prior to the filing, disentitles the plaintiff from claiming relief of injunction. Moreover, it appears

that from 28th October 2019, there has been no ad-interim relief in favour of the appellant till today.

11. On overall consideration of the aforesaid factors, in view of the scope of appeal under Section 104 of Code of Civil Procedure, 1908, as laid down by the Apex Court in the case of **Wander Ltd. & Anr. V. Antox India P. Ltd. reported in 1990 (Supplementary) SCC 727**, no interference against the discretionary order passed by the Court is called for.

12. The Appeal is, therefore, dismissed.

13. In view of the dismissal of the appeal, all pending interlocutory applications are disposed of as infructuous.

14. It is made clear that the observations made in the present order are only in the context of the decision on temporary injunction application, and the Trial Court shall not be influenced by the same while deciding the suit on merits.

(AMIT BORKAR, J.)