

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11476 OF 2019

D. Dayabhai and Co. Pvt. Ltd. ... Petitioner
Versus
M/s. Kapcon Builders & Developers
Pvt. Ltd. and others ... Respondents

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Mr. Vishal Kanade instructed by Mr. Jayesh M. Joshi for the Petitioner.
Mr. N.V. Walawalkar, Senior Advocate alongwith Mr. Dilip Shinde and Mr.
Kishor Patil for Respondent No.1.
Mr. Chintan Shah instructed by Mr. Prithviraj Gole for Respondent No.4.

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CORAM : N.R. BORKAR, J.

RESERVED ON : 7 JUNE 2023

PRONOUNCED ON : 29 NOVEMBER 2023

P.C. :-

1. This petition takes exception to the order dated 20 July 2019 passed by the 5th Joint Civil Judge, Senior Division, Thane below Exhibit 104 in Special Civil Suit No.493 of 2005.
2. By the order impugned, the trial court rejected the application filed by the present petitioner under Order 1 Rule 10 of Code of Civil Procedure, 1908 (CPC).
3. I have heard the learned Counsel for the petitioner and the learned Senior Counsel for the contesting respondent.
4. Respondent no.1 herein has filed the suit for specific performance of contract, declaration and injunction against the respondent

nos.2 to 18. The prayers in the said suit read thus :

“a) It be declared and decreed that the Suit Agreement i.e. Agreement dtd. 19th August 1994 which is registered at Sr.No.3848/94 in the office of Sub-Registrar Thane for sale of the Said Part-A of the Suit Land i.e. land admeasuring 6H 32R, i.e. 63600 sq. mtrs. being Part of Gut No.59/1 situated at Village Chitalsar Manpada, Taluka & District Thane is valid, subsisting and in force and binding upon the Defendant no.1 to 10.

b) It be declared and decreed that Suit Power of Attorney dtd. 26th August 1994, which is duly authenticated and registered at Sr.No.157/1994 in the office of Sub-Registrar Thane constituting the directors of the Plaintiff as their true and lawful Attorneys is valid, subsisting and in force and binding upon the Defendants.

c) It be declared and decreed that by the Possession Receipt dtd. 19th August 1994 executed by Defendant No.1 & 4 to 12 the Plaintiff have been put in legal and absolute possession of the Suit Land and accordingly the Plaintiff is in such possession of the Suit Land.

d) It be declared and decreed that the Oral Suit Agreement concluded on 4th September 1994 between the Defendant No.11 & 12 on the one hand and the Plaintiff on the other hand for sale and transfer of the Said Part-B of the Suit Land i.e. land admeasuring 1H 2R and 2P i.e. 10200 sq.mts. being part of Gut No.59/1 situated at Chitalsar Manpada, Tal. & Dist. Thane is valid, subsisting and in force and binding upon the Defendant No.11 & 12.

e) The Defendant No.1 to 10 be ordered and decreed to specifically perform the Suit Agreement in favour of the Plaintiff to sell and transfer the Said Part-A of the Suit Land to the Plaintiff.

f) The Defendant No.11 & 12 be ordered and decreed to perform their part of the Oral Suit Agreement in favour of the Plaintiff to sell and transfer the Said Part-B of the Suit Land to the Plaintiff.

g) The Defendant No.1 to 12 be ordered and decreed to execute and register necessary Conveyance Deeds and/or other deeds, documents in favour of the Plaintiff to finally transfer and convey the Suit Land to the Plaintiff.

h) Some fit and proper person be appointed as Court Commissioner for the purposes of execution and registration of the documents as mentioned in Clause (g) above in favour of the Plaintiff to finally transfer and convey the Suit Land to the Plaintiff.

i) The Defendants, their agents, servants or anybody claiming through by or under them be restrained by an Order of Permanent Injunction from -

i) disturbing absolute and legal possession of the Plaintiff of the Suit Land and/or interfering with the same in any manner whatsoever.

ii) creating third party interest in respect of the Suit Land in any manner whatsoever.

iii) parting with possession of the Suit Land or any part thereof to any third party.

iv) inducting any third party in the Suit Land or any part thereof.

v) unlawfully and illegally interfering and/or creating obstructions and/or raising false, unlawful and illegal objections in the matter of obtaining permissions under Section 43 of Bombay Tenancy and Agricultural Land Act 1948 and/or under Urban Land (Ceiling & Regulations) Act, 1976.

j) Pending the hearing and final disposal of the Suit, Temporary Injunction in terms of prayer (i) above be granted.

k) Ex-Parte ad-interim reliefs in terms of prayer (i) above be granted.

l) Any other reliefs as deemed fit and proper by the Hon'ble Court in the circumstances of the case be granted in

favour of the Plaintiff.

m) Cost of the suit be awarded to the Plaintiff.”

5. The learned Counsel for the petitioner submits that the petitioner is the owner of the suit property and the respondent No. 1 has admitted the same in the plaint. It is submitted that tenancy/deemed owner proceedings under the provisions of Bombay Tenancy & Agricultural Lands Act, 1948, between the petitioner and respondent Nos. 2 to 18 in respect of suit property are still going on and has not attained finality. The learned Counsel for the petitioner further submits that the trial court by order dated 4 February 2019 below Exhibit 89 granted interim injunction against the present petitioner without giving an opportunity of hearing to the petitioner. It is submitted that considering the overall facts and circumstances of the case, the trial court ought to have allowed the application filed by the petitioner.

6. In support of his submission, the learned Counsel for the petitioner has relied upon the Judgment of the Hon'ble Apex Court in the matter of *Acqua Borewell Pvt. Ltd. vs. Swayam Prabha and others*¹.

7. On the other hand, the learned Senior Counsel for the contesting respondent submits that the question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. It is submitted that if the application filed by the petitioner is allowed then the scope of suit for specific performance would be enlarged and it would be practically a suit for title. It is submitted that the trial court was therefore

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justified in rejecting the application.

8. It is well settled that a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character. The Court cannot therefore allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the parties.

9. As regards the submission made on the basis of order dated 4 February 2019 the same also cannot be accepted for the reason that by the said order no interim injunction has been granted against the petitioner. No interference is thus called for in the impugned order. Writ Petition is dismissed.

(N.R. BORKAR, J.)

10. The learned Counsel for the petitioner submits that the interim order staying the suit passed by this Court dated 14 January 2020, be continued for eight weeks, to enable the petitioner to decide on further course of action including approaching the Hon'ble Supreme Court against the order passed by this Court. The learned Senior Counsel for the contesting respondent submits that the suit is of the year 2005 and thus interim order may not be continued. As the interim order is in operation since last more than three years, the same shall remain in operation for a period of eight weeks.

(N.R. BORKAR, J.)