IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 461 OF 2023
WITH
INTERIM APPLICATION NO. 12729 OF 2023

Citizen Constructions through Proprietor Nisar Ahamad Moharamali Khan ....Petitioner

V/s.

Parvez Mohammed Yusuf Kokani and Ors. ....Respondents

Mr. G.S. Godbole, Senior Advocate a/w. Mr. Yogesh G. Thorat i/by. Mr. Ashok B. Tajane for the Appellant.

Mr. Anil Sakhare, Senior Advocate with Mr. S.S. Patwardhan i/by. Mrinal Shelar for Respondent No.1.

Mr. Sandeep Shinde i/by. Ergo Juris, for Respondent Nos. 2 to 7.

CORAM : SANDEEP V. MARNE, J.

Resd. On : 19 October 2023.

Pron. On : 31 October 2023.

JUDGMENT :

1. The Appeal challenges the order dated 11 October 2022 passed by the Extra Joint Civil Judge Senior Division, Nashik on application at Exhibit-5 filed by the Plaintiff-Respondent No.1 for grant of temporary injunction. By way of temporary injunction, the Trial Court has directed the parties to maintain *status-quo* in respect of possession as well as transfer. The Appellant-Defendant No.7 is restrained from transferring the suit property till disposal of the suit. Defendant No. 7 has filed the present Appeal challenging the order dated 11 October 2022.

2. Some factual narration to comprehend the issue at hand would be necessary. Facts, as captured from the pleadings in the Plaint, are as follows. The entire land in Survey No.511/10/2 was owned by Pramilabai Ramkrishna Mirajkar, who sold the same to Mangal Garden Pvt. Ltd, Pooja Kutir Nirman Pvt. Ltd, Bhakti Nirman Pvt. Ltd. And Thakkar Kutir Nirman Pvt. Ltd. (together referred to as **Developers**). The said purchasers nominated Thakkar Developers for development of the land, who prepared a layout and got the same sanctioned. Defendant Nos. 1 to 6 decided to purchase Plot No. 2 in the layout. Accordingly, they claim to have paid several amounts to the Developers from time to time. However, Defendant Nos.1 to 6 were not in a position to pay the balance consideration for purchase of Plot No.2. Plaintiff claims that since permission for non-agricultural use was yet to be issued, it was not possible for the Developers to execute a sale-deed in favour of Defendant Nos.1 to 6 in respect of Plot No.2. Plaintiff claims that he has close relations with Defendant Nos.1 to 6, who requested him to purchase Plot No.2. Plaintiff had already purchased Plot Nos.4 to 14 in the same layout through separate transactions. Therefore, he agreed to purchase Plot No.2 from Defendant Nos.1 to 6. Accordingly, it is claimed that

Defendant Nos. 2 to 6 executed General Power of Attorney in favour of Defendant No.1 for the purpose of effecting the transaction of sale of the Plot in Plaintiff's favour on their behalf. Acting on that Power of Attorney, Defendant No.1 executed Agreement for Sale dated 28 September 2011 in Plaintiff's favour in respect of Plot No.2. Under that Agreement, the purchase price was fixed at Rs.75,00,000/-, out of which, Plaintiff paid amount of Rs. 35,00,000/- in cash as detailed in the Agreement. The balance amount was not paid as Defendants No. 1 to 6 were yet to get the sale-deed executed in their favour. On 28 May 2012, permission for non-agricultural use of the land was issued by Collector, Nashik and accordingly sale-deed dated 30 March 2013 came to be executed by the Developers in favour of Defendant Nos. 1 to 6. Plaintiff claims that possession of the suit property was handed over to him by Defendant Nos. 1 to 6 vide Possession Receipt dated 26 July 2013. Plaintiff paid further amounts of Rs.17,14,000/- on 20 April 2012, Rs.12,00,000/- on 3 June 2015 and Rs.6,86,000/- on 6 April 2017. This is how the Plaintiff claims to have paid Rs.71,00,000/- to Defendant Nos.1 to 6 by 6 April 2017. Plaintiff was willing to pay the balance amount of Rs.4,00,000/-. However, on 17 August 2017, Defendant Nos. 1 to 6 executed sale-deed in respect of Plot No.2 in favour of Defendant No.7, which came to be registered on 18 August 2017. Plaintiff also came to know that Defendant No.7 obtained development permission in respect of Plot No.2 from Nashik Municipal Corporation on 6 August 2019.

3. Plaintiff thereafter instituted Special Civil Suit No. 83/2020 in the Court of Civil Judge Senior Division, Nashik for specific performance of agreement for sale dated 28 September 2011. The Plaintiff has also challenged registered sale-deed dated 17 August 2017 executed by Defendant Nos. 1 to 6 in favour of Defendant No.7. Plaintiff has made an alternate prayer for compensation of Rs.5,00,00,000/-. In his suit, Petitioner filed application for temporary injunction to restrain Defendants from creating third party rights in the suit property or from changing its nature or from disturbing Plaintiff's possession. It is Plaintiff's case that Defendant No.7 forcibly took possession of the suit plot from Plaintiff on 10 February 2020. It appears that Defendant No.7 filed application at Exhibit-104 on 15 June 2022 contending that Defendant No.7 is in possession of the suit plot and that he had commenced construction thereon. Inviting attention of the trial Court to Plaintiff's application dated 5 May 2022 admitting commencement of construction by Defendant No.7, it was prayed in that application that Plaintiff's application at Exhibit-5 be held to be infructuous. The Trial Court however rejected the application at Defendant No.7 at Exhibit-104 by order dated 4 July 2022 and proceeded to hear and decide Plaintiff's application for temporary injunction at Exhibit-5.

4. After hearing all the parties, the Trial Court decided the application for temporary injunction at Exhibit-5 by its order dated 11 October 2022 and directed parties to maintain *status-quo* in respect of possession as well as transfer. Respondent No.7 (Appellant) is restrained from transferring the suit property till disposal of the suit. Defendant

No.7 is aggrieved by order dated 11 October 2022 and has filed the present Appeal.

5. Mr. Godbole, the learned senior advocate would appear on behalf of the Appellant and submit that no *prima-facie* case existed for Plaintiff for grant of any order of temporary injunction. That suit of Plaintiff is premised on stale Agreement for Sale allegedly executed on 28 September 2011 as against registered sale-deed executed in favour of Defendant No.7 on 18 August 2017. That on the date of execution of Agreement for Sale, the vendors were yet to acquire right, title or interest in the plot. That the Sale-Deed in favour of the vendors (Defendant Nos. 1 to 6) came to be executed much later on 30 March 2013. That therefore the Agreement for sale executed in favour of the Plaintiff in the year 2011 before acquisition of any title in the suit flat is therefore unenforceable.

6. Mr. Godbole would further submit that in pursuance of the registered Sale-Deed, Defendant No.7 has not only opted for possession of the suit property but has procured development permission from Nashik Municipal Corporation and in pursuance thereof has commenced construction of a building on the plot, which has progressed till second floor slab. That considering the development, the Trial Court could not have granted temporary injunction in favour of the Plaintiff. He would further submit that Plaintiff has filed a suit belatedly after 11 long years of execution of alleged agreement for sale and 4 years after execution of registered sale-deed in favour of Defendant No.7. That therefore there is no likelihood of Plaintiff succeeding in his suit and grant of temporary injunction was not at all warranted. Mr. Godbole would further submit that grant of temporary injunction would put Defendant No.7 to great financial losses, since construction of the building on the Plot is underway. He would submit that there is no evidence of payment of any amounts by Plaintiff to Defendant Nos.1 to 6. That the document shown to have been executed on 28 September 2011, on the strength of so called cash payment of Rs. 35,00,000/-, is highly doubtful and in a suit for specific performance of that document, the Trial Court could not have granted any temporary injunction.

7. *Per-contra*, Mr. Sakhare the learned senior advocate appearing for the Plaintiff would oppose the Appeal and support the order passed by the Trial Court. He would submit that Defendant No.7 has taken law into his own hands and has forcibly dispossessed the Plaintiff from the suit plot. That the Plaintiff had fenced the suit plot before filing of the suit and Defendant No.7 removed the said fencing by using gas cutters on the night of 10 February 2020. That the entire act has been video recorded by Plaintiff's sister, which recording is seen by the Trial Court. That the Trial Court has rightly injuncted the Defendant No.7 who has forcibly dispossessed the Plaintiff. Mr. Sakhare would further submit that Plaintiff has paid Rs.71,00,000/- out of total consideration of Rs.75,00,000/- to Defendant Nos. 1 to 6, who have cheated the Plaintiff and surreptitiously executed Sale Deed in favour of Defendant No.7. That Defendant No.7 was aware about the transaction that had taken place between the Plaintiff and Defendant Nos.1 to 6. That he was also aware that possession of the suit plot was with the

Plaintiff and despite knowledge of factual position, Defendant No.7 has taken a calculated risk of executing sale-deed in his favour and having taken such risk, Defendant No.7 must face consequences of temporary injunction clamped by the Trial Court.

8. Mr. Shinde would appear for Defendant Nos.2 to 6 and support the case of the Appellant. He would submit that Defendant Nos.2 to 6 never executed any Power of Attorney in favour of Defendant No.1. That therefore the alleged agreement for sale or possession receipt executed by Defendant No.1 in favour of the Plaintiff on the basis of a non-existent Power of Attorney has no existence in the eyes of law. That Defendant Nos.2 to 6 have not received any amounts allegedly paid by Plaintiff. That on the date of execution of sale-deed in favour of Defendant No.7, Defendant Nos.2 to 6 were both owners as well as possessors of the suit plot and that they have lawfully handed over possession of the Plot in favour of Defendant No.7.

9. Rival contentions of the parties now fall for my consideration.

10. Plaintiff has filed Suit for specific performance of the Agreement for Sale dated 28 September 2011. Undeniably, as on 28 September 2011, Defendant Nos.1 to 6 were yet to acquire title in respect of the suit plot, which was subsequently acquired by them on 30 March

2013 when a registered Sale-Deed was executed in their favour by the Developers. The question that the Trial Court will have to determine at the time of final hearing of the suit is whether the Agreement for Sale executed in Plaintiff's favour before acquisition of title to the plot would be valid in in law and whether such agreement can be directed to be specifically enforced. If the Vendors themselves did not any have any title as on 28 September 2011, whether they could have executed Agreement for Sale in favour of Plaintiff is something which the Trial Court will have to decide at the time of final adjudication of the suit.

11. Plaintiff claims that on the date of execution of the Agreement for Sale dated 28 September 2011, he paid amount of Rs.35,00,000/- in cash to Defendant Nos.1 to 6. The Agreement for sale is not signed by Defendant Nos.2 to 6. It is signed by Defendant No.1 describing him to be the constituted attorney of Defendant Nos. 2 to 6. Execution of such Power of Attorney is denied by Defendant Nos.2 to 6. The payment of consideration in shown in cash, making it difficult to trace journey from the source to the beneficiary. Defendant Nos. 2 to 6 have denied receipt of that amount allegedly paid by Plaintiff in the year 2011.

12. The Plaintiff claims that possession of the suit plot was handed over to him by virtue of possession receipt dated 26 July 2013. Here again, the possession receipt is signed by Defendant No.1 alone acting as constituted attorney of Defendant Nos.2 to 6.

13. The Trial Court thus has before it a Plaintiff, who is claiming rights in respect of the suit plot on the strength of unregistered Agreement for sale executed on 28 September 2011 when vendors were yet to acquire any title in the suit plot. Consideration is shown to have been paid in cash. Agreement is executed on the basis of Power of Attorney, execution of which is under dispute. Possession receipt is also executed by alleged constituted attorney, and execution possession receipt is again under dispute. Plaintiff has thus several hurdles to cross for establishing his right to seek specific performance of agreement for sale dated 28 September 2011. There is also no satisfactory explanation as to why Plaintiff did not have the sale-deed executed in his favour for such a long time. Defendants No.1 to 6 had acquired title in the suit plot by virtue of sale-deed dated 30 March 2013. Plaintiff claims to have paid various amounts to Defendant Nos.1 to 7 on 26 July 2013, 3 June 2015 and 6 April 2017. Plaintiff claims that out of total consideration of Rs.75,00,000/-, he paid amount of Rs.71,00,000/- to Defendant Nos. 1 to 6 upto 6 April 2017. The issue that therefore arises as to what could be the possible reason why the Plaintiff did not get the Sale-Deed executed in his favour for a such a long period of time. Plaintiff has averred in the plaint that he has purchased Plot Nos.4 to 14 in the same layout. It therefore appears that the Plaintiff is a seasoned player in the field of purchase of properties and it is incomprehensible as to why he has taken thr risk of not getting the sale-deed executed in his favour for a considerable period of time. Mr. Sakhare did attempt to impress upon me that there were close relations between the Plaintiff and Defendant Nos.1 to 6 on account of which the sale-deed was not executed. This is something which the Plaintiff will have to prove at the time of the trial in the suit. As of now, I do not find any convincing reason why the Plaintiff, who otherwise is well versed with purchase transactions of plots, delayed execution of sale-deed in his favour, despite payment of 90% of the consideration amount. This conduct on his part would clearly come in his way while deciding his entitlement to equitable relief of temporary injunction.

14. As against the Plaintiff who claims right in the plot on the basis of unregistered agreement for sale executed prior to acquisition of title by vendors, Defendant No.7 is armed with registered sale-deed executed in his favour by the vendors on 17 August 2007. Considering the nature of rights alleged to have been acquired by Plaintiff on one hand and by Defendant No.7 on the other, *prima-facie* it is difficult to hold that Plaintiff has better rights over the suit plot than Defendant No.7.

15. Plaintiff claimed possession of the suit property at the time of filing of the suit property on the strength of possession receipt executed in his favour on 26 July 2013. However, the possession receipt is not signed by Defendant Nos.2 to 6. It is executed by Defendant No.1 alone showing him to be the constituted attorney of Defendant Nos. 2 to 6, who have denied execution of any such Power of Attorney. The possession receipt is again an unregistered document and it is highly doubtful as to whether the Agreement for Sale coupled with possession receipt, which are insufficiently stamped and unregistered can be read in evidence. Plaintiff may seek specific performance of unregistered agreement for sale. However, the moment the possession is claimed on the basis of such agreement, registration and payment of stamp duty would become mandatory. This is yet another factor which the Trial Court will have to decide during the trial of the suit.

16. Much has been said about the manner in which Defendant No.7 forcibly took possession of the suit plot from the Plaintiff. Mr. Sakhare was willing to show the video recording of 10 February 2020 about forcibly taking over of the possession by Defendant No.7. There are allegations and counter allegations as well as various documents filed by parties against each other about possession over the suit plot. It would not be prudent at this stage to enter into that controversy in absence of recording of evidence. Plaintiff allowed Defendant No.7 to execute registered sale-deed in his favour. He waited till Defendant No.7 procured development permission from Nashik Municipal Corporation for construction of a building on the suit plot. He has filed a suit almost after three years of execution of registered sale-deed in favour of Defendant No.7. Apparently, he filed a suit only when the Defendant No.7 was about to commence construction on the suit plot in pursuance of the development permission issued by the Municipal Corporation on 6 August 2019. His suit for specific performance of agreement dated 28 September 2011 is filed 11 years after execution of that agreement. Having taken multiple calculated risks in (i) executing agreement for sale with vendors who had no title, (ii) making cash payment at the time of execution of agreement for sale, (iii) not getting sale deed executed in his favour for over 7 years after acquisition of title by vendors, (iv) accepting possession by unregistered and insufficiently stamped document and (vi) waiting for 3 years after execution of sale deed in favor of Defendant No. 7, Plaintiff cannot be granted the equitable and discretionary relief of temporary injunction.

17. In my view, therefore no *prima-facie* case is made out by the Defendant for grant of any blanket temporary injunction in his favour during the pendency of suit. In my view, the Trial Court ought to have balanced the equities rather than issuing a blanket mandatory injunction. The Trial Court has granted temporary injunction in following terms :

> 1. Parties are directed to maintain status-quo in respect of possession as well as transfer.
> 2.Defendant No.7 is restrained from transferring the suit property in any manner whatsoever, till disposal of the suit.
> 3. Cost in main cause."

18. Though there is no specific restraint order against Defendant No.7 from carrying out construction, the direction of maintenance of *status-quo* creates confusion. Defendant No.7 is also restrained from transferring the suit property. This would mean that Defendant No.7 will not be in a position to sell the flats constructed in the building. By now, the building has come upto second floor slab. In such circumstances, it would be necessary to balance the equities between the parties, rather than granting any blanket order of injunction.

19. Plaintiff claims to have paid Rs.71,00,000/- to Defendant Nos.1 to 6 for purchase of suit plot. He has also made alternate prayer for compensation of Rs.5 crores. Considering the nature of transactions between the parties, it would be appropriate if Defendant No.7 is directed to keep some of the constructed portion in the building unencumbered for the purpose of securing the alleged rights of Plaintiff. Mr. Godbole has placed on record a chart showing government valuation and market value in respect of Flat Nos.201 and 202 in the building under construction. As per the Government valuation, market price of Flat Nos.201, 202 is Rs.70,3,1500/- whereas market value, the same is 1,19,21,800/- In my view, the equities can be balanced by directing Defendant No.7 to keep Flat No.201 and 202 unencumbered during pendency of the suit, which would ensure protection of rights of Plaintiffs to some extent. The fact that the Plaintiff has purchased several other plots in the layout (Plot Nos.4 to 14) would mean that suit plot has not been purchased by him for his residence. Thus proposed purchase of suit plot by Plaintiff appears to be for his business purposes. Therefore there is no question of cause of any loss which is impossible of being compensated in terms of money. The balance of convenience is tilted heavily in favour of Defendant No.7 (who has commenced construction) and against Plaintiff (who has kept the Plot vacant despite allegedly possessing it since 2013).

20. Accordingly, the order of temporary injunction passed by the Trial Court deserves to be modified. I accordingly proceed to pass the following order.

(i) The order dated 11 October 2022 passed by the Trial Court is set aside and modified to the extent that Appellant/Defendant No.7 shall keep Flat Nos. 201 and 202 in the building to be constructed on the Suit Plot unencumbered till disposal of the suit. Defendant No. 7 shall not sell, transfer, mortgage or grant license or part with possession of Flat Nos. 201 and 202 till disposal of the suit.

(ii) The Trial Court shall expedite the hearing of the suit and shall make an endeavor to decide the same as expeditiously as possible and preferably within a period of two years from today.

21. With the above directions, the Appeal is **disposed of.** With disposal of the Appeal, Interim Application No. 12729/2023 taken out for stay does not survive. The same is disposed of as infructuous.

SANDEEP V. MARNE, J.

22. After the judgment and order is pronounced, the learned counsel appearing for Respondent No.1 would pray for continuation of the order dated 11 October 2022 passed by the Trial Court for a period of eight weeks in order to enable Respondent No.1 to test this judgment and order before the Apex Court. Request is opposed by the learned counsel appearing for the Appellant. Considering the fact that the order was operational since 11 October 2022, the same is extended by a period of six weeks from today.

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SANDEEP V. MARNE, J.