IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 780 OF 2024
WITH
INTERIM APPLICATION NO. 14541 OF 2024

Lalji Hirji Arethiya ...Appellant
Versus
Vasudev Krishna Gharat And Another ...Respondents

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Mr. M.V. Thorat a/w. Mr. Priyank Shukla, for for Appellant
Mr. Kailash Dewal a/w. Mr. Yatin Malvankar, for Respondent No.1.
Mr. S.R. Nargolkar a/w. Mr. Tanaji Mhatugade for Respondent No.2.

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CORAM : M.M. SATHAYE, J.
DATE : 4th DECEMBER, 2024

P.C. :

1. Heard learned counsel for the Appellant/Plaintiff and learned counsel for Respondent Nos.1 & 2/Defendants.

2. The appeal is filed challenging the order dated 07.05.2024 passed by the Civil Judge, Senior Division, Panvel below Ex.5 in Special Civil Suit No. 289 of 2023. By the said impugned order, the application filed by the Appellant/Plaintiff for restraining Respondent Nos.1 & 2 from creating third party interest, is rejected. The suit in question is filed by the Appellant seeking specific performance of agreement (revised Memorandum of Understanding-MoU) dated 28.06.2018.

3. Learned counsel for the Appellant submitted as under. That the agreement between the Respondent Nos.1 & 2 dated 23.12.2010 contemplated under clause No.6 that Respondent No.2 had agreed to sell the suit property to a person nominated by Respondent No.1 and the said clause indicates that Respondent No.1 was entitled to sell or enter into an agreement with third person on behalf of Respondent No.2. That clause 23 of the said agreement provided that Respondent No.1 was supposed to pay for expenses for getting the necessary permission on behalf of Respondent No.2. He submitted that this clause required Respondent No.1 to spend money, which he did not have, and therefore Respondent No. 1 had approached the Appellant who is a Builder. For investing money in getting the permission from Respondent No.2, an MoU came to be executed between the Appellant and Respondent No.1 dated 10.09.2012 & revised MoU dated 28.06.2018. That in January 2023 when Respondent No.2's name came on record (meaning thereby that Respondent No. 2 became deemed purchaser), the Appellant approached for completing the transaction of the suit property, which was not complied with. That thereafter, Respondent No. 2 sold 50% of the suit property to a third person and to that document, Respondent No.1 has signed as consenting party. In these set of contentions, it is submitted that suit for specific performance is filed and interim injunction was sought. It is submitted that the Appellant has paid Rs. 1,58,38,000/- to Respondent No. 1 and Rs. 10,00,000/- to the Respondent No. 2 and therefore the Respondents must be restrained from creating third party interest.

4. *Per contra,* learned counsel for Respondent No.2 submitted that there is no privity of the contract between Respondent No.2 and the Appellant. He submitted that Respondent No. 2 is not signatory to both MoU and revised MoU between the Appellant and Respondent No. 1. He further submitted that if the document dated 23.12.2010 between him and Respondent No. 1 is perused and its recitals are read as whole, it is obvious that it was plain agreement to sell by Respondent No.2 in favour of Respondent No.1. He submitted that clause 6 is nothing but a nomination clause and clause 23 provided for an arrangement between Respondent Nos. 2 and Respondent No. 1 about expenses and that arrangement has nothing to do with the Appellant.

5. Learned counsel for Respondent No.1 pointed out that if the documents between the Appellant and Respondent No.1 (MoU 10.09.2012 & revised MoU dated 28.06.2018) are carefully considered, it is obvious that the documents are commercial transaction for earning profit and it does not indicate an agreement which can be specifically performed, especially given the fact that in the said documents, consideration columns are left blank and the property is stated to be owned by Mominpada Masid Trust. He pointed out under clause 4 of revised MoU, division of profits are contemplated and therefore specific performance of such agreement cannot be granted. He submitted that compensation in monetary terms are sufficient in this case. Therefore, even *prima facie* no interim injunction about the suit property is warranted.

6. I have considered the submissions and perused the documents

pointed out to me, during the arguments.

7. At the outset, the document on the basis of which, it is alleged that Respondent No.1 has approached the Appellant, must be seen carefully. It is a document between Respondent Nos.1 & 2 dated 23.12.2010. After going through recitals therein, it can been seen that it is a plain document of ‘agreement to sell’ or ‘contract for sale’ having nomination clause 6 and no right or agency is created by Respondent No. 2 in favour of Respondent No.1 to sell the suit property or bind Respondent No.2.

8. If the Appellant invested money with Respondent No.1 for spending on the expenses as stated in para 23 of the ‘agreement to sell’ between Respondents, then in order to bind Respondent No.2 for such arrangement, Respondent No.2 ought to have been made party to said arrangement between the Appellant and Respondent No.1. It is undisputed that Respondent No. 2 is not signatory to both MoU and revised MoU between the Appellant and Respondent No. 1.

9. Perusal of the impugned order shows that Trial Court has rightly held that the agreement between Respondent Nos.1 & 2 is merely an agreement/contract to sell and there is no transfer of right, title and interest in favour of Respondent No.1. Therefore it is rightly held that Respondent No.1 had no right to create any further third party interest with the Appellant, so as to bind Respondent No.2.

10. It is trite law u/s. 54 of the Transfer of Property Act, that the only right available with either party under ‘contract for sale’, is to

seek specific performance and such contract by itself does not create any interest in or charge on the property. Therefore in absence of specific clause indicating intention to bind a party for further sell etc., such inference cannot be drawn between Respondent Nos. 1 & 2.

11. So far as the argument of the Appellant that the recital in clause (x) of the registered sale deed dated 05.10.2023 executed by Respondent No.2 in favour of 'third party' (Patel/Nisar/Gajra) to which Respondent No. 1 is consenting party, that they have neither received any amount not transacted with anybody else in respect of suit property, is ex-*facie* false considering that the earlier MoUs were executed with Respondent No.1 and Rs.10 lakh was paid by the Appellant directly to Respondent No.2, suffice it to say that the said clause, if at all, gives right to the said third party and not to the Appellant. There is nothing on record to indicate under what head or agreement, the Appellant has directly paid Rs.10 lakh to Respondent No.2. In that view of the matter, the said argument does not advance case of the Appellant.

12. Since the suit is pending, this Court is refraining from making any comments about merits of the case, both in respect of specific performance or refund or compensation.

13. Viewed in the light of aforesaid discussion, the impugned order does not suffer from any perversity or error apparent on the face of the record. The impugned order is passed, based on material available on record. Hence, it requires no interference.

14. Appeal from Order and pending interim application are accordingly dismissed. No costs.

15. All concerned to act on duly authenticated or digitally signed copy of this order.

(M.M. SATHAYE, J.)