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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 458 OF 2024

WITH

INTERIM APPLICATION NO. 9580 OF 2024

1. Vinay R Shah)
Aged 65 years having his current)
residence at 201/202, Dev Puja)
Co-Operative Housing Society,)
North Avenue, Santacruz (W),)
Mumbai-400054) ...Appellant/Applicant

Versus

1. Twilight Litaka Pharma)
Limited, a company incorporated)
under the Companies Act, 1956,)
having its registered office at)
Himalaya Estate, 16-A,)
Shivajinagar, Pune 411005)
through its director Mr.Gopal Ramorti)
2. Official Liquidator of Twilight)
Litaka Pharma Limited, having)
address at Bombay High Court,)
Bank of India building, 5th floor,)
Mumbai 400023)
3. Alpha Biomed India Private)
Limited, a company incorporated)
under the Companies Act, 1956,)
having its registered office at)
Office no. 404, 4th floor, 29/2,)
City Care, CTS Shivajinagar,)
Pune 411005.) ...Respondents

Mr. Ankit Lohia a/w. Ms. Nikita Bhansali, Mr. Tejas Gupta, Mr. Param Shah i/b. Yasmin Bhansali & Co. for Appellant/Applicant.

Mr. Girish Godbole, Senior Counsel, Mr. Amrut Joshi, and Mr. Rubin Vakil i/b. Mr. Sumit Kothari, for Respondent No. 3.

CORAM : M.M. SATHAYE, J.

DATE : 10th DECEMBER, 2024

ORAL JUDGMENT :

1. Learned counsel for the Appellant and learned senior counsel for Respondent No.3 were heard on 26.11.2024 and the matter was placed today for passing order.

2. This appeal is filed challenging the Order dated 10.04.2024 passed by the learned Civil Judge, Senior Division, Vadgaon Maval, Dist. Pune below Eh. 39 in Special Civil Suit No.109 of 2023. By the said impugned Order, the application filed by the Appellant/Plaintiff was rejected, which was filed for restraining Respondent No.3 from obstructing the access of Appellant to the suit land as well as direction to Respondent No.3 to provide access road to the Appellant for reaching suit property through adjoining southern side land bearing Survey Nos. 116/2A & 116/2B.

3. The suit land is Gat No. 117/2/B admeasuring 1 Hectares and 95.5 Ares situated at Mouje Vadgaon Maval, Tal.Maval, Dist. Pune. The same was owned by Respondent No.1 Company, which is presently under liquidation and represented through Respondent No.2 - Official Liquidator. The suit land is on the northern side. Land Survey Nos.116/2A and 116/2B is situated towards south side of the suit land and was also owned by Respondent No.1 at the relevant time. On 28.03.2011, Respondent No.1 - Company entered into a registered Agreement for Sale with the Appellant / Plaintiff in respect of the suit land (northern side land) for total consideration of Rs.2.25 Crore, out of which the Appellant paid earnest amount of

Rs.25 lakhs. It is the case of the Appellant that he has so far paid total amount of Rs. 1.25 Crore under the transaction. It is further his case that he is continuously ready and willing to perform his part of the contract and pay but Respondent No.1 got the said period extended from time to time and later on avoided to execute sale deed. It is the case of the Appellant that Respondent No.1 – Company, under clause 5 of the said Agreement for Sale, has agreed to provide access road to the suit land through southern side Gat Nos. 116/2A and 116/2B. It is contended that the Appellant / Plaintiff recently came to know that Respondent No.1 Company had gone into liquidation and Respondent No. 3 has purchased the southern side land Survey Nos.116/2A and 116/2B in auction purchase. It is contended that Respondent No. 3 has started construction over the southern side land with compound wall and therefore, if the construction is completed the right of the Appellant to have access to the suit land through southern side land will get affected and obstructed and therefore, the suit is filed.

4. The suit is filed in July 2023, seeking specific performance of the said Agreement for Sale dated 28.03.2011 against Respondent Nos.1 and 2 and alternately prayer for compensation is also made. Permanent injunction is sought against Respondent No.3 not to disturb the right of way from the southern side land.

5. Learned counsel for the Appellant has relied upon clause (5) of the said Agreement for Sale under which Respondent No. 1 had undertaken and agreed to provide access to Appellant to enter the suit land through its existing factory land having Survey Nos.116/2A

and 116/2B (the southern side land), now purchased by Respondent No.3. He submitted that this clause will bind Respondent No. 3 also as Respondent No. 3 has purchased the southern side land from Respondent No.1, though under liquidation under auction. He submitted that on 10.12.2019, Appellant had sent letter to Respondent No.2 - Liquidator asking to complete transaction and get a sale deed executed. He also submitted that on 22.01.2020, Appellant's advocate has sent notice to Respondent No.2 - Liquidator stating that if sale deed is executed and the suit land is handed over to the Appellant, the Appellant is ready to comply with his obligation and pay the balance amount of Rs.1 crore which can be utilized by the Liquidator to pay off the liability of Respondent No.1 - Company.

6. On the other hand, learned senior counsel for Respondent No.3 submitted that the said Agreement for Sale executed by Respondent No.1 -Company in favour of Appellant does not create any right *per se* in favour of the Appellant except for seeking specific performance; the Appellant is not owner of the suit land. He submitted that Respondent No. 3 is not party to the said Agreement for Sale between the Appellant and Respondent No. 1 and therefore its clauses can not bind Respondent No. 3. He submitted that the Appellant was never put in possession of the suit land. He submitted that perusal of the said Agreement for Sale would show that there is no recital about the Appellant being put in possession. He further submitted that from the averments in the plaint paragraph 16 & 24 and Notice dated 22.01.2020 paragraph 4, the suit is *ex-facie* barred by limitation. It is contended that unless the Appellant is owner or in

possession of the suit land, the right of way cannot be claimed under law. Provisions of section 4 & 12 of the Indian Easement Act, 1882 (“the said Act”, for short) are pressed into service.

7. Learned counsel for the Appellant, in rejoinder, submitted that from the southern side land purchased by Respondent No. 3, a portion of the land may be kept aside so as to satisfy the obligation under clause (5) in the said Agreement of Sale in favour of the Appellant. He submitted that since the Appellant will become owner if specific performance is granted, therefore such portion of land needs to be kept aside, as prayed in interim application which is in aid of final relief sought by the Appellant.

8. Learned senior counsel for Respondent No. 3 submitted on instructions, that as on today, the factory building is already constructed in the southern side land along with compound wall.

9. I have considered the submissions carefully and perused the documents.

10. The question that falls for consideration is - whether a proposed purchaser of ‘part A of land’ can restrain actual purchaser of remaining ‘part B of land’ from using some portion of its own ‘part B of land’, for a claim of easement of grant to which actual purchaser is not party, based on a possibility of decree of specific performance in respect of ‘part A of land’ when proposed purchaser is not in possession of ‘part A of land’ ? The answer is No.

11. The right of way as claimed by the Appellant is easement by

grant, being creature of a contract. In the present case, the suit land is the alleged dominant heritage and the southern side land purchased by Respondent No.3 is the alleged servient heritage. Section 4 of the said Act defines the easement and it provides that an easement is a right which the 'owner' or 'occupier' of certain land possesses. The basis of the Appellant's claim is the said Agreement for Sale. This agreement does not indicate any recital about possession in favour of the Appellant. In the plaint paragraph 24, the Appellant clearly admitted that suit land is in possession of Respondent No.2 - Liquidator. From the legal notice issued on behalf of the Appellant, it can be clearly seen that on 22.01.2020 the Appellant has asked Respondent No.2 - Liquidator that 'if the subject matter land is handed over to the Appellant', he will comply with payment of balance consideration. This shows that the Appellant is not in possession of the suit land. Stray claim made in letter dated 07.02.2023 written to asset reconstruction company and legal notice dated 22.02.2023, about Appellant being put in possession, is washed away by averments made subsequently in plaint about possession of Respondent No. 2 Liquidator, as indicated above.

12. Since the basis of the Appellant's claim is an Agreement for Sale and not a sale deed, obviously, the Appellant is not owner. This is also evident also from the prayer made in the suit which is of specific performance. Under section 54 of Transfer of Property Act, 1882 a contract for sale does not by itself create any interest in or charge on the property. The party only gets a right to seek specific performance. In such circumstances as on today, the Appellant is

neither owner nor occupier to claim any easementary right as defined u/s.4 of the said Act. Section 12 of the said Act provides as to who may acquire easement. It provides that an easement may be acquired by the owner of an immovable property for beneficial enjoyment of which right is created or on his behalf by any person in possession of the same. Therefore, it is clear that the Appellant is not entitled to claim any right of way at this stage when the Appellant is neither owner nor in possession of the property land.

13. The argument of the Appellant that an interim relief in aid of final relief can be granted and therefore, since the Appellant is likely to get a decree of specific performance, his alleged right of way should be protected by way of interim order, is unacceptable at this stage. The case would have been different if the Appellant was in possession as part performance.

14. Viewed in the light of aforesaid facts and circumstances, the impugned Order by which the interim relief is rejected, cannot be faulted.

15. Learned Trial Judge has rightly considered that there is nothing to indicate the Appellant's possession over the suit land in pursuance of Agreement for sale. It is rightly held that when there is no possession or ownership with the Appellant and when actual right of way is not given to the Appellant and when he is not actually using or exercising said right, there is no question of having *prima facie* case in that regard. It is further rightly held that for the same reasons, the balance of convenience as well as irreparable loss will

tilt against the Appellant.

16. The suit is apparently filed in 2023 when the averments in the plaint indicates that as early as in December 2016 itself, the Appellant had sought refund of the amount paid under the agreement to sell. Therefore, the said suit is apparently filed belatedly. Since the suit is pending for hearing, this Court is refraining from commenting on the merits of claim of specific performance and limitation, at this stage.

17. Therefore, the impugned order does not suffer from any perversity or error apparent on the face of the record. The reasons given and conclusion arrive at is based on material available on record. Hence it needs no interference.

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

19. It is however clarified that any further construction, after this Order, on the southern side Survey Nos.116/2A and 116/2B by the Respondent No. 3, will be subject to final outcome of the suit.

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

(M.M. SATHAYE, J.)