

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 1 OF 2024
IN
INTERIM APPLICATION NO. 3447 OF 2023

Sanjay Hari Ram Kedia)
Age 51 years,)
Occp. Services, W-4601,)
West Wing, World One Towers,)
Senapati Bapat Marge, Lower Parel,)
Mumbai – 400013) ...Appellant

Versus

Ashok Shadi Lal Minda)
Age 62, Occp. Business,)
17, Olaf Palm Marg, Vasant Vihar,)
New Delhi – 110 057) ...Respondent

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Mr. Chetan Kapadia, Senior Advocate a/w. Mr. Nihal Shaikh,
Nikhil Shirsekar & Mr. Vishesh Kulkarni i/b. Mustaf Motiwala, for
Appellant.

Mr. Mustafa Doctor, Senior Advocate a/w. Spenta Kapadia, ms.
Shreeya Pednekar i/b Mr. Akash Menon for Respondent.

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**CORAM : NITIN JAMDAR &
M.M. SATHAYE, JJ.**

DATE : 5 FEBRUARY 2024

JUDGMENT (PER M. M. SATHAYE J)

. Heard the learned counsel for the parties. Taken up for final
disposal by consent.

2. This is an appeal filed by original Plaintiff against the sole Defendant challenging judgment and order dated 29 November 2023 passed in Interim Application No. 3447 of 2023 in Suit No. 525 of 2023 by the learned single Judge of this Court. By the said impugned order, the said Interim Application seeking injunction against the Respondent restraining him or his agents, representatives etc. from selling, transferring, alienating, encumbering or creating third party interest or parting with possession of the suit property and for appointment of receiver, is rejected.

FACTS

3. Few facts shorn of unnecessary details are as under. The Appellant has filed the above suit for specific performance of agreement between the Appellant and Respondent which is borne out from exchange of email communications/ correspondence for sale of flat No. 6601, West Wing, World One Towers, Senapati Bapat Marg, Lower Parel, Mumbai-400 013 along with three car parkings, which is hereinafter referred to as “the suit flat” for short. It is the case of the Appellant that Respondent is owner of the suit flat who has bought it from the developer. The Appellant is residing in the same building where suit flat is situated. Pursuant to the deliberations and negotiation the Respondent agreed to sell the suit flat to the Appellant for total amount of Rs.32.25 Crores and such concluded contract between the parties is borne out from the exchange of email communications. It is the case of the Appellant that Rs. 50 Lac was offered as token / earnest money to be paid at the

time of execution of Memorandum Of Understanding (“MOU” for short), however, when the draft MOU was forwarded on his behalf to the Respondent, since the Respondent was traveling out of India, inability was expressed to sign the physical copy and hence it was suggested from Respondent’s side to proceed for execution of final document directly. It is the case of the Appellant that the MOU as forwarded to the Respondent was accepted by the Respondent vide his email dated 7 July 2023 with two suggestions; first in respect of outstanding amount with the builder to be paid by the Respondent seller until the execution of registered sale deed and second about maintenance top up and club membership amounts, to be paid by the Appellant purchaser. The Appellant contends that pursuant to this acceptance, the Appellant and his team proceeded with due diligence and draft of public notice was forwarded to the Respondent, which was communicated to be ‘OK’ by the representative of the Respondent. It is the case of the Appellant that even thereafter, email communications have ensued between the Appellant’s lawyer and representative of the Respondent for exchanging information that took the transaction further. It is further contended that on 30 July 2023, the broker intimated the Appellant that Respondent has suggested through his representative that the Appellant should pay Rs.9 crores to the Respondent forthwith i.e. prior to execution of sale deed and thereafter, the Respondent would clear his home loan and retrieve the original documents from the bank. From this stage, it is contended that there was no response

from the Respondent or his representative though the Appellant was ready to perform his part of the contract. It is contended that the Appellant was surprised when the Respondent addressed the email dated 2 September 2023 alleging that after 19 August 2023, the previous communications have no value because the Appellant stopped communication after 5 August 2023. It is contended that the Appellant made futile attempt to persuade the Respondent for completing the transaction but the Respondent did not budge. In these circumstances, the Appellant has filed the above suit and interim application.

4. The Respondent filed an affidavit-in-reply to the above interim application through his Constituted Attorney contending *inter alia* that no contract was ever arrived between the parties and therefore, the suit is *ex-facie* not maintainable. It is contended that exchange of email communications especially dated 6 July 2023 and 7 July 2023 between the two sides, when read together constitutes no contract because in email dated 7 July 2023 there is a disclaimer clause that the messages unless followed by an agreement does not tantamount to an offer or an acceptance by the sender. It is contended that emails dated 6 July 2023 and 7 July 2023 at the highest constitute only an offer made by the Appellant to the Respondent and the Respondent has in fact in his response email dated 7 July 2023 proposed changes in the terms and as such there is no clear acceptance. It is submitted that assuming without admitting that email dated 6 July 2023 and 7 July 2023 constitute a contract, it has to come to an end on 19

August 2023 i.e. on expiry of 45 days from 6 July 2023 and since the Appellant did not communicate with the Respondent at all, between 5 August 2023 and 22 August 2023, the Appellant has made it clear by conduct that he had lost interest in purchase of the suit flat. It is contended that the Appellant's own broker Mr. Mazumdar has also made several unsuccessful attempts to contact the Appellant and even he believed that the Appellant is no longer interested in pursuing his offer and the said broker has in fact introduced the Respondent to other prospective purchasers. In short, the defence raised by the Respondent is that of absence of concluded contract and time being essence thereof assuming that there was a contract.

SUBMISSIONS

5. Heard Mr. Kapadia learned senior counsel for the Appellant and Mr. Doctor learned senior counsel for the Respondent. The learned counsel have taken us through various email communications and documents placed on record.

6. Mr. Kapadia submitted that exchange of emails, especially email dated 4 July 2023 under which draft MOU was sent to the Respondent, email dated 6 July 2023 under which it was informed that the Respondent can not sign it at the moment since he is travelling out of country and suggesting direct execution of registered sale deed and email dated 7 July 2023 from Respondent himself accepting the terms of the MOU with two changes, there is

enough material to suggest that there was concluded contract between the parties. He submitted that it was Respondent's suggestion that since he was traveling he is not signing the MOU and he shall directly proceed with the registered sale deed. He submitted that the main ground on which the impugned order is passed is the disclaimer clause in email dated 7 July 2023. Inviting our attention to the said email dated 7 July 2023, Mr. Kapadia submitted that this email was sent by Respondent using his company email, which contains a 'Confidentiality / Proprietary Note' which is merely in the nature of disclaimer usually found in the company's communications. Therefore, the last line in the said disclaimer, which is heavily relied upon by the learned Judge should not be considered at all. He contended that Respondent has not sent this communication using his private email. He contended that even otherwise, the said disclaimer is not part of the email written by the Respondent himself but is just an addition or latch-on text due to use of company email. He submitted that in the totality of the circumstances all the ingredients of a concluded contract are squarely found in the exchange of email correspondences viz. identification of the property, finalization of the total consideration, contemplation about the payment of earnest money and intention of the parties to agree on terms and conditions. Mr. Kapadia, lastly contended that time cannot be considered as an essence of contract because it is a transaction involving sale of immovable property. It is further pointed out that as late as on 2 September 2023, the Respondent

himself by an email accepted that it is true that they both were interested in dealing with the suit flat. He submitted that this surely lends credence to the Appellant's case about concluded contract.

7. Mr. Kapadia in support of his case, relied upon judgments in cases of *Kollipara Sriramulu (Dead) By His LRs Vs. T. Aswatha Narayana (Dead) By His LRs and Ors.*¹, *Alok Bose Vs. Parmatma Devi And Ors.*² and *Goldmines Telefilms Pvt. Ltd. Vs. Reliance Big Entertainment Pvt. Ltd. and Ors.*³

8. *Per contra*, Mr. Doctor, senior Advocate for Respondent submitted that email dated 6 July 2023 is sufficient to show that the acceptance was not absolute from the Respondent. He submitted that when changes are suggested in response to an offer, it cannot be taken as complete acceptance and therefore, cannot constitute a concluded contract. He further submitted that assuming that there was a concluded contract, the MOU itself contains a clause setting out outer limit for completing the transaction and since that outer limit got over on 19 August 2023, the contract cannot be taken as enforceable. He also submitted that the discretion exercised by the Court of first instance in refusing interim relief to the Appellant, be not replaced by fresh discretion of the Appellate Court. He further submitted that the Appellant's own broker Mr. Mazumdar was unsuccessful in contacting the Appellant and even he believed that the Appellant was no longer interested and therefore, he had

1 (1968) 3 SCR 387

2 (2009) 2 SCC 582

3 Appeal (L)/458/2014 in NM/452/2014 in Suit No.194 of 2014

introduced the Respondent to other prospective purchasers. This goes to show that the Appellant was not serious about completing the deal.

9. Mr. Doctor in support of his submissions, relied upon judgments in case of *Padia Timber Company Private Limited Vs. Board of Trustees of Visakhapatnam Port Trust Through Its Secretary*⁴, *Wander Ltd. and Another Vs. Antox India P. Ltd.*⁵ and *World Crest Advisors LLP Vs. Catalyst Trusteeship Limited and Ors*⁶

REASONS AND CONCLUSIONS

10. We have carefully considered the rival submissions and also considered the case laws relied upon by both the sides. What is under consideration is three settled parameters for decision of the interim relief, viz. *prima facie* case, balance of convenience and irreparable loss. Perusal of the impugned order shows that the application is rejected on the ground that no *prima facie* case is made out.

11. Perusal of emails dated 4th, 6th and 7th July 2023 clearly shows that the Respondent was not available for signing the MOU and therefore, it was suggested from the Respondent's side that the parties would proceed to execute the final document directly. It is further borne out by the emails dated 4 July 2023 and 6 July 2023 sent from the Appellant's side that the Appellant was eager to get

4 (2021) 3 SCC 24

5 1990 (Supp) SCC 727

6 2022 SCC OnLine Bom 1409 :

confirmation about terms and conditions and therefore, draft MOU was sent and its confirmation, at least on email was insisted. From perusal of the email dated 7 July 2023 by Respondent, sent from his company email, it is clear that the terms of MOU was accepted by him *albeit* with two suggestions. It is nowhere found on record that two suggestions by the Respondents were either denied or disputed by the Appellant. In fact, communications from 7 July 2023 onwards from the Appellant's side would show that after the terms of the MOU were accepted, the Appellant immediately communicated that they will take forward due diligence. By email dated 10 July 2023, Appellant's lawyer has gone ahead with sharing of a public notice draft which was also agreed to be 'OK' by the representative of the Respondent on same day. The Advocate's lawyer on 13 July 2023 then shared e-copies of actual public notices and thereafter, on 18 July 2023, the Appellant's Advocate has raised certain queries as part of the due diligence process. It is further seen from the email dated 20 July 2023 issued by Respondent's representative Mr. Jain that the queries were replied point wise.

12. It is further seen that by email dated 21 July 2023, the Appellant's Advocate has asked for certain documents for drafting of sale deed. It is therefore clear that all these steps were taken by the Appellant with co-operation from the Respondent's side showing that the agreement / contract was acted upon. On 30 July 2023, for the first time, demand for Rs. 9 Crores to be paid to the Respondent/Seller was communicated. It appears that thereafter,

emails were exchanged between broker and representatives of the parties about fine tuning the actual terms of payment. On 23 August 2023, the Appellant sent an email to the Respondent expressing in clear terms that due diligence is completed and funds are ready with him and the parties can go ahead for registration. The Appellant's lawyer has thereafter, on 30 August 2023 sent email informing all concerned that key formalities for completing the transaction are over and draft sale deed is ready requiring approval before execution and registration. On 2 September 2023, the Appellant even directly addressed email to Respondent asking for phone call to close the deal reiterating that based on agreement, he has spent resources for due diligence and the matter needs to be taken forward. Apparently, by email dated 2 September 2023, the Respondent has raised the point of time-limit stating that after 19 August 2023, all the previous communications have no value. It will not be out of place to mention that in this email, the Respondent clearly admitted that it is true that both the parties were interested in dealing with the suit flat.

13. In the aforesaid factual background, we find that even though the MOU was not physically signed by the Respondent, it was due to his inability to do so. It was stated in so many words because Respondent was traveling out of India and therefore email confirmation was sent accepting terms of the MOU. The two suggestions made by the Respondent in his email dated 7 July 2023 are neither disputed nor denied by the Appellant. It is material to note that in email dated 7 July 2023, the Respondent after making

two suggestions, has in fact stated “*Kindly go ahead with due diligence*”. If the Respondent’s acceptance was not absolute, why would he ask Appellant to go ahead with due diligence ? Once the terms of the draft MOU are clearly accepted by the Respondent, although changes are suggested, when they are neither disputed nor denied, they cannot pose any hindrance to the concluded contract.

14. About the argument that time is essence of contract and therefore after 19 August 2023, the agreement can not be enforced, it is needless to re-iterate that it is not so in case of sale of immovable properties. We note that bare perusal of draft MOU sent for confirmation to the Respondent, shows that the clause 4, where 45 days time for completion of transaction is provided, there is a note showing that it is ‘to be confirmed’. It shows that this clause setting time limit is an open ended clause. The Respondent while accepting the MOU terms has not stated anything closing this open end. Therefore, unless there is trial and intention of the parties are well discerned on appreciation of evidence, time can not be treated as essence of the contract, at least at this interim stage.

15. About the so-called disclaimer of not binding the sender unless messages are followed by an agreement in email dated 7 July 2023, Mr. Kapadia is right in contending that it is part of the general disclaimer which is latch-on text because company’s email is used. It is not written by Respondent and does not indicate the actual intention of the Respondent while accepting the terms of the MOU.

Therefore, the impugned order is based on an erroneous position that the standard disclaimer would override the cogent material on record indicating the existence of concluded contract. In view of this fundamental error we are required to interfere in appeal.

16. For all these reasons, there is *prima facie* case in favour of the Appellant that there was a concluded contract between the parties, which was acted upon from both the sides.

17. Having held so, the aspects of balance of convenience and irreparable loss will have to be considered. It is obvious that if the Respondent proceeds ahead to sell or further encumber the suit flat, the Appellant's suit would be rendered infructuous. In that case, third party equities may come in play, leading to multiplicity of proceedings and complications. The Appellant would, in that case, obviously suffer irreparable loss for not receiving an immovable property as agreed.

18. It is settled position of law that in a suit for specific performance, the Appellant/Plaintiff has to be always ready and willing to perform his part of the contract. The Appellant vide his email dated 26 August 2023 had clearly expressed that his funds are ready for execution of sale deed. Not only this, but before taking up the Appeal for final disposal, we had given an opportunity to the parties to check if they can settle the dispute by suitably modifying their offer/counter-offer, particularly regarding consideration agreed. The learned counsel for the parties informed the Court, on

instructions, that though the Appellant was ready to increase the amount of consideration payable for purchase of the suit flat if the Respondent was ready at that time, the settlement failed. As such, the Appellant has shown continued readiness and willingness, even ready for upping his offer.

19. In the totality of facts and circumstances narrated above, both aspects of the balance of convenience and irreparable loss, in our view, turn in favour of the Appellant.

20. Hence the following order :

(A) The Appeal is allowed. The impugned order dated 29 November 2023 passed in Interim Application No. 3447 of 2023 is set aside.

(B) The Respondent or anybody claiming through or under him, is hereby restrained from selling, transferring, alienating, encumbering or creating third party rights or parting with the possession of the suit flat, during the pendency of the suit.

(C) It is clarified that the observations made in this order are only prima facie in nature limited for the purpose of deciding interim application and shall not prejudice the parties at the time of final hearing of the suit.

(M.M. SATHAYE, J.)

(NITIN JAMDAR, J.)