IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

APPEAL AGAINST ORDER NO. 18 OF 2024

1. Prabhavati Kantilal Jogi,
   Aged about 80 years, Occ. Household

2. Virendra Kantilal Jogi,
   Aged about 51 years, Occ. Business

3. Chetan Kantilal Jogi,
   Aged about 48 years, Occ. Business

All R/o. Behind Pooja Complex,
Gaurakshan Road, Akola,
Tah. & Dist. Akola. . . . **APPELLANTS**

// **V E R S U S** //

Manoj Krishnakumar Sureka,
Aged about 52 years, Occ. Business,
R/o. Ranisati Apartment, Gaurakshan Road,
Akola, Tah. & Dist. Akola. . . . **RESPONDENT**

Shri A. R. Deshpande, Advocate for appellants.
Shri M. G. Sarda, Advocate for respondent.

CORAM :- M. W. CHANDWANI, J.

RESERVED ON :- 25.09.2024

PRONOUNCED ON :- 22.10.2024

JUDGMENT :-

Heard.

2. **Admit**. Heard finally by consent of the learned counsel for the parties.

3. The appeal takes exception to the orders dated 19.12.2023 and 02.03.2024, passed below application (Exh.5) & application (Exh.26) respectively, in Spl. Civil Suit No. 164/2023. The Trial Court by allowing application (Exh.5) restrained the appellants from alienating and transferring or creating third party interest and handing over the suit property to any third party by any mode or manner pending the suit. The Trial Court also rejected the application (Exh.26) of the appellants for issuing directions to the respondent to deposit the sum of consideration alongwith interest with a conditional order that if the respondent fails to deposit the amount as directed by the Court, the temporary injunction granted in favour of the respondent shall be vacated.

4. The traces of the dispute lie in the agreement (Token Pawati), whereby the appellants, after receipt of token amount of Rs. 51,000/-, agreed to execute an agreement to sell the suit property having carpet area of 5705 sq. feet @ Rs.7,500/- per sq. feet to the respondent.

5. The respondent filed a suit for a decree of specific performance of contract with a direction to the appellants to execute the sale deed of the suit property in favour of the respondent. The respondent alleges in the suit that before executing the Token Pawati,

it was revealed that the suit property belongs to appellants' father-Kantilal Jogi and after his death, the appellants as well as their five sisters have interest in the suit property. The appellants had agreed to get the relinquishment deed executed from the sisters and also to obtain a correction deed from the previous owner- Mahendrakumar Girdharlal Jogi. On assurance of the appellants to execute these two documents, on 01.02.2023, the Token Pawati has been executed by the appellants in favour of the respondent. The plaint depicts that at that time, the appellants orally agreed that they will obtain the registered relinquishment deed and correction deed on or before 16.02.2023 and thereafter, the formal agreement to sell will be executed by accepting ¼th amount of consideration. Further contention in the suit is that inspite of various requests, the appellants did not get the relinquishment deed and correction deed registered for one reason or another. Thereafter, suddenly on 04.11.2023, a public notice was issued by an Advocate showing interest of his client to purchase the suit property and calling for objections if any, from the public. The respondent not only raised an objection to the said public notice but also contacted the appellants, however, they avoided to have a talk with the respondent. Therefore, the aforesaid suit came to be filed.

6. Alongwith the suit, an application (Exh.5) for grant of temporary injunction seeking a restraining order against the appellants

not to create third party interest or part with the possession in respect of the suit property was also filed. The appellants appeared and contested the suit as well as the application (Exh.5). The Trial Court after hearing both the parties passed the impugned order dated 19.12.2023 below Exh.5 allowing the application of the respondent.

7. Since, the suit has been filed on the allegation that due to increase of 25% in the market price of the suit property, the appellants are avoiding the sale-deed, the appellants filed pursis before the Trial Court contending that they are ready to execute the sale-deed on deposit of the entire consideration amount with 12.5% increase in the market price of the suit property. However, the respondent did not respond to the said pursis. By application (Exh.26), the appellants again sought a direction to direct the respondent to deposit the consideration amount with 13.50% increase in market price of the suit property due to delay and harassment with a specific direction that if no amount is paid by the respondent till 20.02.2024, the injunction order granted on 19.12.2023 will be vacated. The said application (Exh.26) came to be rejected by the Trial Court on the ground that whether the plaintiff is at fault or not is yet to be determined in the trial. Feeling aggrieved with orders impugned, the present appeal came to be filed.

8. Shri A. R. Deshpande, learned counsel for the appellants would submit that the agreement to sell has not been executed till date and only Token Pawati, on receipt of Rs.51,000/- against a consideration of Rs.4,27,87,500/- is executed. The Token Pawati has been executed which means that the contract for sale is yet to be concluded and there is no concluded contract which can be specifically enforced. The learned counsel for the appellants also vehemently submitted that there is no condition in the Token Pawati that ¼th amount will be given on execution of registered relinquishment deed and correction deed from other claimants of the suit property. Rather, the condition mentioned in the Token Pawati is that, agreement to sell is to be executed within 20 days on payment of ¼th of the consideration amount, failure to do so will result with forfeiture of the token amount. The respondent failed to pay ¼th of the consideration amount within 20 days from execution of the Token Pawati hence, the alleged Token Pawati stood cancelled and therefore, the respondent will not have any right in the suit property from such Token Pawati. The terms of the Token Pawati itself speak in volumes that time is the essence of the contract. The conditions, which are not mentioned in the Token Pawati cannot be imported. The Token Pawati does not specify when the registered relinquishment deed or the correction deed is to be executed by the appellants but the Trial Court on its own

assumption without any material on record came to the conclusion that there might be a possibility of an oral agreement as alleged by the respondent in this regard prior to execution of the Token Pawati. Rather, finding of the Trial Court is that it is one of the probabilities.

9. The sum and substance of the argument of the learned counsel for the appellants is that there was no concluded contract and only Token Pawati was issued with further condition that agreement to sell is to be executed within 20 days on payment of ¼th of the consideration amount with a condition that if the agreement is not executed within 20 days, the amount of Token Pawati will be forfeited. The essential condition of the Token Pawati has not been complied with, therefore, the agreement to sell could not be executed. This aspect has not been considered by the Trial Court, therefore, the impugned orders do not sustain in the eye of law.

10. To buttress his submission, he seeks to rely upon the decision of the Apex Court in the case of ***Shenbagam and others Vs. K. K. Rathinavel*** [1]***.*** The Apex Court in para no. 32 of the judgment has observed as under:-

> *"32. Having said that, the terms of the agreement stipulated that the respondent was to pay the balance consideration within a period of six months and "on receipt of the balance consideration", the appellants were to execute the sale deed "pertaining to the property free from all encumbrances". It is evident from the agreement that*

1 **2022 SCC Onlie SC 71**

> *the liability to deliver the property free from any encumbrance was on the appellants. However, this obligation is prefaced by the condition that the appellants would be required to execute the sale deed free from encumbrance on the receipt of the balance consideration. Thus, the agreement did not specify when the appellants should discharge their mortgage- before the expiry of six months, after receipt of the advance amount, or after receipt of the balance consideration. It only obligated them to ensure that after the balance consideration is received, the sale deed executed should be free from encumbrances. Based on a plain reading of the agreement, we are unable to accept the respondent's plea that he was willing to perform his obligations under the contract. It is evident that he was required to pay the remaining consideration (or indicate his willingness to pay) and only then could have sought specific performance of the contract. The respondent has also urged that the additional amount of Rs. 10,000 was paid to the appellants to discharge the mortgage. The acknowledgment signed by the appellants indicates that the money was to meet urgent family expenses. Since no further details have been provided and no evidence has been adduced by the respondent-plaintiff, we cannot conclude that the money was for discharge of the mortgage. Even assuming that the respondent is correct, the agreement still required the respondent to pay the balance consideration. In this regard, the High Court, while holding in favour of the respondent, has noted that the appellants were free to demand a further amount for discharging the mortgage. This finding ignores the plain terms of the contract. The agreement clearly provided that the balance consideration would be paid and then the sale deed would be executed. How the appellants chose to discharge the mortgage was for them to decide. The respondent had to prove his readiness and willingness to perform the contract."*

11. He further relied upon the judgment of the Apex Court in the case of ***Rajasthan State Industrial Development and Investment Corporation Vs. Diamond & Gem Development Corporation Ltd.***[2]. Para 23 of the judgment reads as under:-

> *"23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the*

2 **(2013) 5 SCC 470**

> *court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. [Vide: United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal (AIR 2004 SC 4794) and Polymat India P. Ltd. v. National Insurance Co. Ltd. (AIR 2005 SC 286)]."*

12. Conversely, Shri M. G. Sarda, learned counsel for the respondent submitted that, before execution of the Token Pawati, there were oral talks regarding getting the relinquishment deed and the correction deed from the concerned persons and therefore, token amount was given to the appellants and the Token Pawati came to be issued. According to him, the Token Pawati also speaks about the date before which the sale-deed was to be executed, therefore, it cannot be said that the contract was not concluded. To buttress his submission, he seeks to rely upon the decision of this Court in the case of ***Eastern Star Hotels and Resorts Pvt. Ltd., Goa Vs. Sanjeev Dhingra*** [3]

13. Next, Shri M. G. Sarda, learned counsel for the respondent submitted that, even an oral agreement can be directed to be specifically performed. Just because the formal document i.e. the agreement to sell was not executed, that itself will not make an oral agreement ineffective. For this purpose, reliance is placed on the decision of the Apex Court in the case of ***Kollipara Sriramulu (dead) by***

3 **2016 (6) Mh.L.J. 564**

his legal representative Vs. Aswatha Narayan (dead) by his legal representative*[4]*.

14. Lastly, the learned counsel for the respondent submitted that the Trial Court has rightly appreciated the case of the respondent and granted temporary injunction in favour of the respondent. He further submitted that the Trial Court was also justified in refusing to give directions sought by the appellants for depositing consideration amount alongwith additional 13.5% towards increase in market price of the suit property. The Trial Court observed that the said direction cannot be given at an *ad-interim* stage. The learned counsel for the respondent placed reliance on the decision of this Court in the case of ***Yusuf Mohamed Lakdawal Vs. Sudhakar Kashinath Bokade*** [5]**.**

15. Having heard the learned counsel for the respective parties as well as after going through the impugned orders, it transpires that the appellants agreed to sell the suit property to the respondent on 26.01.2023 after accepting token amount of Rs.51,000/-. Accordingly, a Token Pawati came to be executed on 01.02.2023. Bare perusal of the Token Pawati reveals that the agreement to sell was to be executed within 20 days from the date of receipt of the Token amount i.e. till 16.02.2023. It was also specifically

4 **AIR 1968 SC 1028**
5 **2008 (2) Mh.L.J. 682**

agreed that the respondent shall pay ¼th of the total consideration at the time of agreement to sell coupled with the condition that if due to any contingency, the agreement to sell is not executed within the time, the token amount will be forfeited and the agreement shall stand cancelled. The case of the respondent before the Trial Court is that before execution of the Token Pawati, the appellants orally agreed that they will get the relinquishment deed and the correction deed registered from the concerned persons and after that ¼th amount of consideration shall be paid to the appellants and accordingly, the agreement was to be executed. Then the question arises that if the said condition was agreed prior to the execution of the Token Pawati then why the said condition was not mentioned in the Token Pawati, more particularly when the Token Pawati also stipulates the time limit of execution of the sale-deed as 11 months after execution of Token Pawati i.e. till 16.01.2024. This itself create a doubt whether the terms, as claimed by the respondent, were orally agreed upon before execution of Token Pawati by the appellants or not. Rather this issue is itself a matter for trial which is to be decided on the basis of evidence that may be lead in the trial.

16. Evidently, the Token Pawati did not specify the condition that only after getting the relinquishment deed and the correction deed registered from the concerned persons, ¼th of the earnest amount

of total consideration would be payable and the agreement to sell would be executed. Something which is not mentioned in the agreement cannot be read. Rather, it is evident from the Token Pawati that the agreement to sell was to be executed within 20 days from the date of receipt of token amount of Rs.51,000/-, wherein other essential conditions of the agreement were also mentioned. Based on plain reading of the Token Pawati, *prima facie,* it appears that payment of part consideration within the specific time was one of the essential conditions.

17. Section 36 of the Specific Relief Act, 1963 provides for grant of preventive relief. Section 37 of the Act provides that temporary injunction in the suit shall be regulated by the Civil Procedure Code, 1908. Grant of relief for specific performance of contract is itself a discretionary relief. The plaintiff seeking temporary injunction for specific performance has to establish a strong and *prima facie* case on the basis of undisputed facts. The conduct of the plaintiff will also to be a relevant consideration for the purpose of grant of injunction. The discretion, at this stage, is not to be exercised arbitrarily.

18. Further, in matters of grant of injunction particularly, at the interim stage, satisfaction regarding there being a *prima facie* case

by itself is not sufficient. The Court, therefore, has to satisfy itself that irreparable injury will be caused to the plaintiff and balance of convenience lies in favour of the plaintiff. For that purpose, the Court has to ascertain that there is an element of mutuality in the contract and if there is an absence of mutuality, the Court shall not exercise discretion in favour of the plaintiff.

19. A reference can be made to para no. 14 of the decision of the Supreme Court in the case of ***M. P. Mathur Vs. DTC*** [6], which reads thus:-

> *"14. The present suit is based on equity.. . . . .*
> *In the present case, the plaintiffs have sought a remedy which is discretionary. They have instituted the suit under Section 34 of the 1963 Act. The discretion which the Court has to exercise is a judicial discretion. That discretion has to be exercised on well-settled principles. Therefore, the Court has to consider - the nature of obligation in respect of which performance is sought, circumstances under which the decision came to be made, the conduct of the parties and the effect of the of the Court granting the decree. In such cases, the Court has to look at the contract. The Court has to ascertain whether there exists an element of mutuality in the contract. If there is absence of mutuality the Court will not exercise discretion in favour of the plaintiffs. Even if, want of mutuality is regarded as discretionary and not as an absolute bar to specific performance, the Court has to consider the entire conduct of the parties in relation to the subject-matter and in case of any disqualifying circumstances the Court will not grant the relief prayed for [Snell's Equity, 31st Edn., page366]. . . ."*

20. Heavy burden lies on the plaintiff to establish consensus *ad idem* between the parties to the agreement. The Court has to proceed cautiously to find out whether a *prima facie* case is made out

6 **(2006) 13 SCC 706**

or not. The Trial Court without any condition in Token Pawati concluded *prima facie* in favour of the respondent on assumption that, since the relinquishment deed and the correction deed was to be executed by the appellants from the concerned persons, therefore, there may have been understanding between the parties before execution of the Token Pawati. That apart, it is not a case where substantial amount of consideration was paid as token, as the deal was worth more than Rs. 4½ crores and on a token amount of Rs.51,000/- an injunction not to create third party interest is sought. These aspects have not been considered by the Trial Court and has given erroneous findings that *prima facie* case and balance of convenience lies in favour of the respondent.

21. So far as the case of ***Eastern Star Hotels and Resorts Pvt. Ltd., Goa*** (supra) and ***Yusuf Mohamed Lakdawal*** (supra) are concerned, in the said decisions the Apex Court has observed that even a token receipt clarifying the intention of the parties to sell and purchase the property is a concluded contract between the parties. However, in the present case, the respondent relied on the conditions which are not mentioned in the token receipt, which he alleged was agreed upon by the appellants orally, therefore, the case of ***Eastern Star Hotels and Resorts Pvt. Ltd., Goa*** (supra) ***and Yusuf Mohamed Lakdawal*** (supra) will not be helpful to the respondent.

22. So far as the challenge to rejection of the application for direction to deposit the entire consideration alongwith increase of 13.50% of total consideration is concerned, no doubt, the respondent could have offered to deposit the entire consideration amount without any increase but that was not done.

23. Be that as it may, the fact remains that the Court cannot direct any party to deposit the entire consideration amount at an *ad-interim* stage. The repercussions of not depositing the consideration amount in the Court will be considered during the course of the trial when the Court will be dealing with the issue of readiness and willingness on the part of the respondent. Thus, no interference is required in the impugned order dated 02.03.2024 passed below application (Exh.26).

24. Resultantly, the appeal is partly allowed.

25. The order dated 19.12.2023, passed below application (Exh.5), in Spl. Civil Suit No. 164/2023 is hereby quashed and set aside and the application (Exh. 5) is dismissed.

(M. W. CHANDWANI, J.)

26. At this stage, the learned counsel for the respondent submits that the respondent may approach before the Apex Court against this order therefore, he submits that the interim injunction which was operating in favour of the respondent by virtue of the impugned order dated 19.12.2023 may be continue to operate for a further period of eight weeks from today. The learned counsel for the appellants opposed the said request.

27. Considering the submissions made by the learned counsel for the respondent, there shall be stay to the effect and operation of this order for a period of six weeks from today.

(M. W. CHANDWANI, J.)

RR Jaiswal