



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

APPEAL AGAINST ORDER NO. 16 OF 2024

1. Sunil S/o. Maniklal Mutha,
Aged about 60 years, Occ. Agriculture

2. Gurav S/o. Sunil Mutha,
Aged about 32 years,

Both R/o. 12, East High Court Road,
Ramdaspath, Nagpur- 440 010.

... **APPELLANTS**

// VERSUS //

M/s. Peak Realty, a Partnership Firm duly
Registered under the provisions of the
Partnership Act, 1932, through its Partner-
Shri Harsh S/o. Omprakash Agrawal,
Aged about 47 years having Office at
Wardhman Nagar, Nagpur-440 008.

... **RESPONDENT**

Shri Rohit Joshi, Advocate for appellants.
Shri H. R. Gadhia, Advocate for respondent.

CORAM :- M. W. CHANDWANI, J.

RESERVED ON :- 19.08.2024

PRONOUNCED ON :- 06.09.2024

JUDGMENT :-

Heard.

2. **Admit.** The matter is heard finally by consent of the
learned counsel for the parties.

3. This appeal takes an exception to the order dated 20.06.2024 passed by 12th Jt. Civil Judge Senior Division, Nagpur in Special Civil Suit No. 974/2021, thereby allowing the application (Exh. 5) filed by the respondent for restraining the appellants from alienating and creating third party interest in the suit property till final disposal of the suit.

4. The facts giving rise to the present appeal can be summarised as under:-

i) The respondent has filed a suit for specific performance alleging that deceased- Maniklal Mutha was owner of the agricultural land bearing Khasra No. 77 of Village- Tarodi (Khurd), Tahsil Kamptee, District Nagpur, admeasuring 3.61 HR i.e. 8.92 acres (hereinafter referred to as “ the suit property”) and he agreed to transfer the leasehold right in the suit property to the respondent, through his power of attorney holder i.e. respondent no. 1, @ Rs.65 lakhs per acre. A token agreement dated 13.04.2021 came to be executed by paying a token amount of Rs.5 lakhs; the detailed agreement was to be executed within 30 days and the sale deed was to be executed within 15 months from the date of the said agreement. The respondent prepared a draft agreement to sale and forwarded the same to the appellants. However, the appellants failed to execute the agreement,

therefore, a notice dated 19.07.2021 came to be issued. Despite the notice, appellant no. 1 refused to execute the agreement. Maniklal died, bequeathing the suit property to appellant no. 2, his grandson. Therefore, a suit came to be filed by the respondent for specific performance of contract and for a decree directing the appellants to execute the sale deed in favour of the respondent. The appellants resisted the claim of the respondent *inter alia* contending that the agreement to sale cannot be specifically enforced as there is no concluding contract and the terms of agreement were to be settled between the appellants and the respondent, therefore, a decree for specific performance of contract cannot be granted on the basis of a token agreement.

ii) Along with the suit, the respondent has also filed an application (Exh. 5) for grant of temporary injunction requesting the Court to issue directions to the appellants not to create a third party interest in respect of the suit property. The learned Trial Court, after hearing both the parties, passed the impugned order restraining the appellants from alienating and creating third party interest in the suit property pending the suit. Feeling aggrieved with this, the present appeal came to be filed.

5. Mr. Rohit Joshi, learned counsel for the appellants would submit that after the token agreement, draft agreements were exchanged. However, the terms could not be settled and the agreement could not be finalized. In that scenario, the agreement cannot be said to be a concluded contract and therefore, it is not enforceable. He submitted that the last draft agreement, which was forwarded by the respondent alongwith notice, goes to show that the application for renewal of lease agreement was to be filed by the purchaser i.e. the respondent and the appellants would only co-operate in the matter. Likewise, for change of use of the land, it was the respondent who had to take steps, whereas, the pleadings are contrary to the draft agreement sent by the respondents. Therefore, it is a case of non-concluding contract, which has not been considered by the Trial Court. He further submitted that the property worth Crores has been withheld by paying just a token amount of Rs.5 lakhs, which is not permissible under the law. The learned Trial Court did not consider this aspect and erroneously allowed the application (Exh.5) restraining the appellants from creating a third party interest in the suit property. It is submitted that the learned Trial Court hastily allowed the application for temporary injunction, which is erroneous and therefore, is required to be set aside.

6. Conversely, Mr. H. R. Gadhia, learned counsel for the respondent vehemently submitted that, once the appellants have accepted the token amount towards sale of the agricultural land, they are bound by the said written token agreement. According to him, the respondent was ready and willing to perform its part of contract but, it is the appellants, who had, on one pretext or another, denied to execute the sale deed. According to him, on execution of token receipt, a public notice was also given regarding the transaction. The draft agreement was sent to the appellants, however, they deliberately avoided the execution of the agreement just to avoid the contract. There is a likelihood of nature of property being changed through alienation or transfer. Unless and until a case of irreparable loss is made out by the appellants, the Court should not allow to change the status-quo. He submitted that the order passed by the learned Trial Court is correct and well-reasoned. A specific draft was prepared stating the conditions which were agreed upon, therefore, the appellants cannot just avoid the performance of the contract. No perversity appears in the order passed by the learned Trial Court. He supported the impugned order and seeks dismissal of the appeal. According to him, the suit can be directed to be tried expeditiously without interfering with the impugned order passed on application (Exh.5).

7. It is matter of record that appellant no. 1 agreed to sell the suit property to the respondent @ Rs.65 lakhs per acre. A token amount of Rs.5 lakhs was accepted by the appellants and accordingly, the token receipt was issued. A detailed agreement, mentioning the terms and conditions, was to be executed within 30 days and the sale deed was to be executed after 15 months. The copy of notice, along with annexures and draft agreement to sale were issued by the respondent asking the appellants to execute detailed agreement to sale of the property as per the draft annexed with the said notice. Thus, it appears that the agreement to sale, with respect to other essential conditions on which the property was to be sold to the appellants, is not executed till date. Though, in the draft agreement sent by the respondent to the appellants, the responsibility of getting the lease renewed and conversion of use of land was cast on the respondent however, the plaint depicts that it is the appellants, who have to obtain renewal of lease of the suit property. The conversion of use of the land from agricultural to residential one is also to be made by the appellants. These aspects *prima facie* go to suggest that the terms of agreement were not concluded between the parties. The exchange of notices suggests that there were ongoing negotiations between the parties, which reflects that the matter was still in the embryo stage. Thus, the respondent has failed to establish that there was mutuality

between the parties on important terms of the agreement. Rather, whether there exists a concluded contract between the parties, is itself is a matter of trial, which is to be decided on the basis of evidence that may be led in the trial.

8. 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.

9. 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.

10. 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***¹, 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]. . . .”

11. In the case of ***V R. Sudhakara Rao Vs. T. V. Kameshwari***², the Supreme Court, in para no. 16 of the judgment, has observed as under:-

“16. The High Court has rightly concluded that there is no clear proof relating to the other terms of condition. The relief of specific performance is discretionary relief and except the oral evidence, there is no clear evidence to prove several of the essential terms which have been taken note of by the High Court. The High Court, on analyzing the evidence, has come to hold that except Exhibit B-1 and the oral evidence of DW1 and DW2, there is no other clear proof relating to the other terms

¹ (2006) 13 SCC 706

² (2007) 6 SCC 650

and conditions of the contract which can be termed as essential conditions like delivery of possession and also the obtaining of permission from the Urban Land Ceiling Authorities and therefore, it cannot be said that all the essential terms and conditions of a well concluded contract had been established in the case at hand.”

12. There is no doubt that even oral agreement to sale of immovable property can be specifically enforced as well as execution of token 'Bayana' binds the executant. However, while assessing a *prima facie* case in a suit for specific performance of contract in a fully concluded written agreement to sale, the terms of contract and essential conditions are required to be interpreted and that will be the basis for the Court to come to the conclusion of there being a *prima facie* case. This advantage is not available in a suit based on a mere token agreement. In a case where the remaining conditions of the contract were yet to be settled, averments made in the plaint carry great value and are required to be strictly construed. Heavy burden lies on the plaintiff to establish consensus *ad idem*. The Court has to proceed cautiously and read the averment minutely to understand the nature of the case to find out whether a *prima facie* case is made out or not. The averments made in the plaint must inspire confidence in the Court regarding credibility and truthfulness of the averments. Any inconsistency made in the averments in the plaint like that of a material fact, vagueness and unspecific averments in the plaint shall be considered against the plaintiff while making a *prima facie* case.

13. In the present case, as referred above, there is inconsistency in the draft agreement, which according to the respondent, was sent alongwith the notice and it has been claimed that the liability of getting the lease of the suit property renewed would be with the appellants, apart from the liability of conversion of use of that land; whereas, the plaint depicts contrary conditions to the one contained in the draft agreement which *prima facie* suggests that other essential conditions of the contract were not concluded. That apart, it is not a case where substantial amount of consideration has been paid. The deal was worth more than Rs.5 crores and on a token amount of Rs.5 lakhs, an injunction is sought not to create third party interest. Further, it is to be noted that in the present case, whether there was a concluded contract between the parties or not is itself the question, which is to be gone into during Trial. These aspects have not been considered by the Trial Court and it has erroneously given the finding that balance of convenience lies in favour of the plaintiff.

14. So far as the decision in the case of ***Kamal Kumar Vs. Premlata Joshi*** ³ of the Supreme Court is concerned, in the said decision itself it is observed that a Court has to first consider whether there exists a valid and concluded contract between the parties for sale and purchase of the property apart from other conditions set out in

para no. 7 of the said judgment. Therefore, this decision will not be helpful to the respondent.

15. The decision in the case of ***Maharwal Khewaji Trust (Regd), Faridkot Vs. Baldev Dass***⁴ relied upon by the learned counsel for the respondent observing that until and unless a case of irreparable loss or damage caused to the parties of a suit is made out, the Court should not permit the nature of the property to be changed, which also includes alienation or transfer of the property. The said suit was for possession on the basis of interest created in the suit property, whereas, the present case in hand is a suit for specific performance of contract, where the interest of the appellants in the suit property is yet to be transferred in favour of the respondent, therefore, this case is not applicable to the fact of the present case.

16. In the case of ***Haren Kirshnakumar Mehtra Vs. Kamla Pribhdas Nebhanani***⁵, the seller had acted on the agreement and even took an initiative to make the purchaser a Member of the Society and thereafter, he resiled from the agreement and therefore, in that scenario this Court has held that mere returning of amount of earnest money being illegal and improper and could not affect the agreement, whereas the factual scenario in the present case is different.

⁴ (2004) 8 SCC 488

⁵ AIR 2001 BOM 197

17. Sofaras, the case of *P Ramasubbamma Vs. V Vijayalakshmi*⁶ is concerned, in the said case the execution of agreement to sale and the payment of advance of substantial sale consideration is admitted by the vendor, whereas in the present case, whether there exists a concluded contract between the parties or not is a matter of trial and only Rs.5 lakhs have been given out of consideration of more than Rs.5 crores. Therefore, the cited case will not assist the respondent.

18. To conclude, the Trial Court did not consider the vital aspects of the case referred above and proceeded to grant temporary injunction, which is not sustainable and is required to be set aside. Resultantly, I proceed to pass the following order:-

- i) The appeal is allowed.
- ii) The impugned order dated 20.06.2024 passed on application (Exh.5) by 12th Jt. Civil Judge Senior Division, Nagpur in Special Civil Suit No. 974/2021, is hereby quashed and set aside.
- iii) The application (Exh. 5) is dismissed.

(M. W. CHANDWANI, J.)

19. At this stage, the learned counsel for the respondent requested that the effect and operation of this order be stayed for a period of eight weeks from today to enable the respondent to get the order tested before the Supreme Court.

20. Considering the submission of the learned counsel for the appellants as well as the learned counsel for the respondent, the effect and operation of this order is stayed for a period of four weeks from today.

(M. W. CHANDWANI, J.)