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

APPEAL AGAINST ORDER NO. 8 OF 2024

Virendra S/o. Sadashiv Nikhar,
Proprietor- M/s. Shiv Infrastructure,
Aged about 50 years, Occ. Business,
R/o. C/o. Pravin More, Shop No. B-1, B-2,
Plot No. 65, Uday Nagar Square,
Shri Ram Nagar, Nagpur 440 024. . . . **APPELLANT**

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

Abhishek S/o. Kishor Jaju,
Aged about 39 years, Occ. Business,
R/o. Ramkurpa, Jaju Chowk,
Avadhutwadi, Yeotmal. . . . **RESPONDENT**

Shri S. P. Kshirsagar, Advocate for appellant.
Shri Shrish L. Kotwal, Advocate for respondent.

CORAM :- M. W. CHANDWANI, J.

RESERVED ON :- 30.08.2024

PRONOUNCED ON :- 08.10.2024

ORAL JUDGMENT :-

Heard.

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

3. Correctness of the order dated 13.06.2023, passed below Exh. 31 in S.C.S. No. 656/2022 is questioned in this appeal, whereby

the application of the appellant (original defendant) under Order 39, Rule 4 of the Civil Procedure Code (CPC) for setting aside the order of temporary injunction came to be rejected. The facts, leading to filing of this appeal can be summarized as under:-

i) The respondent filed a suit for cancellation of agreement dated 22.02.2021 alleging that the appellant had agreed to purchase land bearing Survey No. 171, P. H. No. 38, admeasuring 1.23 HR, Class-I, Mouza Pipla (hereinafter referred to as "the suit property") for a total consideration of Rs.4,40,00,000/-. The Sale Deed was to be executed on or before 28.06.2021. The respondent delivered the possession of the suit property to the appellant. However, the appellant failed to perform his part of the contract as three cheques of Rs.50 lakhs each, dated 28.06.2021 issued by the appellant could not be honored and returned unpaid for want of sufficient funds. The appellant also failed to pay cash amount of Rs.30 lakhs as agreed. Thus, total amount of Rs.1,80,0000/- has not been paid by the appellant. The respondent also executed a registered General Power-of-Attorney (PoA) on 22.02.2021 in favour of the appellant to facilitate the appellant to develop the suit property by converting it into non-agricultural land. Due to breach of conditions of the agreement, the respondent does not not want to deal with the suit property as per general PoA. The respondent issued a notice for cancellation of the agreement to sell and PoA dated 22.02.2021. Alongwith the suit, an application (Exh.5) for temporary injunction came to be filed for restraining the appellant from creating third party interest in the suit property. The appellant came up with a case that the consideration was fixed at Rs.4,10,00,000/- and the entire consideration was paid. Therefore, General PoA came to be executed and possession of the suit property was handed over to the appellant. The appellant was ready to perform his part of the contract and inspite of several requests, the respondent failed to hand over the original documents of the suit property for execution of Sale Deed. The appellant, on the strength of the PoA, got the Sale Deed of the suit property executed on 30.11.2021 and hence, sought rejection of the application.

ii) After hearing both the sides, the Trial Court found that three cheques of Rs.50 lakhs could not be honored because therein payment was stopped by the appellant. As the balance consideration was yet to be paid and the Sale Deed dated 30.11.2021 was executed without giving any intimation to the respondent, the Court found that *prima facie* case and balance of convenience was in favour of the respondent and allowed the application (Exh.5) for restraining the appellant from alienating and creating third party interest in the suit property till disposal of the appeal.

iii) Thereafter, the appellant filed an application (Exh.31) under Order 39, Rule 4 of the CPC for vacating the interim order dated 18.10.2022 passed below Exh. 5, on the premise that after passing the order of temporary injunction, the appellant has paid an amount of Rs.1,50,00,000/- through RTGS, which has been admitted by the respondent, therefore, due to change of circumstances, the interim order granted in favour of the respondent be vacated. After hearing both the sides, the Trial Court rejected the application (Exh.31) filed by the appellant, which is under challenge in this appeal.

4. Mr. S. P. Kshirsagar, learned counsel for the appellant submitted that temporary injunction restraining the appellant from alienating the suit property was granted solely on the basis of the fact that the consideration was not paid by the appellant. According to him, the said condition is duly complied with and now, the appellant has transferred Rs.1,50,00,000/- through RTGS to the account of the respondent. The appellant is in possession of the suit property and the appellant has even sold some of the plots in the suit property. Now, no balance consideration amount remains to be paid to the respondent, therefore, the appellant got interest in the suit property since the sale deed got executed on strength of the PoA of the respondent. Therefore, the order restraining the appellant from alienating the suit property

should be vacated. According to him, while considering *prima facie* case, balance of convenience and irreparable loss, the Court has to consider whether the party seeking injunction can be compensated in terms of money. According to him, in the alternative, the respondent has claimed an amount of Rs.1,80,00,000/- out of which he has received Rs.1,50,00,000/-. In that scenario, the order is required to be vacated. It is also submitted that the appellant has an interest in the suit property. On the other hand, and in wake of the Sale Deed and subsequent payment of balance consideration, the respondent has no interest left in the suit property. Therefore, continuation of the interim injunction against the appellant will not only create hardship but will also cause irreparable to the appellant alongwith the persons to whom the plots in the suit property were sold on strength of the PoA executed by the respondent. To buttress his submission, he seeks to rely on the decisions in the following cases:-

i) Best Sellers Retail (India) Pvt. Ltd. Vs. Aditya Birla Nuvo Ltd. [(2012) 6 SCC 792];

ii) Ramesh Vajabhai Rabari Vs. Pratiksha Real Estate Pvt. Ltd. [(2014) 12 SCC 190] and

iii) Sobha Developers Ltd. Vs. Lanka Sitaram Kamthe [(2014 (3) Mh.L.J. 445].

5. *Per contra*, Mr. Sirish L. Kotwal, learned counsel for the respondent, vehemently submitted that the application is not maintainable as Order 39, Rule 4 of the CPC is applicable only in certain exigencies, which have not occurred in the present case. Therefore, the application is not maintainable and the order rejecting the application (Exh.31) is just and proper.

6. The learned counsel for the respondent vehemently submitted that though, the amount of Rs.1,50,00,000/- is credited in account of the plaintiff but still, the claim of the respondent for the remaining Rs.30,00,000/- has not been satisfied. He further submitted that the appellant had suppressed execution of the Sale Deed from the respondent. The interim order is not only asked for non-payment of consideration but also on suppression of material from the respondent. Therefore, the Trial Court is justified in refusing to vacate the interim order of injunction and rightly refused the relief to the appellant.

7. Having heard the learned counsel for the respective parties, it is necessary to examine whether the application under Order 39, Rule 4 of the CPC is maintainable. Order 39, Rule 4 of the CPC is reproduced herein:-

> *"**4. Order for injunction may be discharged, varied or set aside.** —Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:*

Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interests of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party."

8. Thus, an interim order of injunction can be varied only on two conditions. Firstly, the party knowingly made a false or misleading statement and injunction was granted without notice to the party and subsequently, if the order has been passed after hearing the other side, only on the ground when the Court is satisfied that setting aside the order is necessitated by the circumstance or the order passed has caused undue hardship to that party.

9. From the application (Exh.31) filed before the Trial Court, it appears that the appellant is claiming vacation of the interim order under the Second proviso to Order 39, Rule 4 of the CPC due to change in circumstances, which necessitated vacation of the order as undue hardship is being caused to the appellant.

10. Perusal of the order dated 18.10.2022 passed by the learned Trial Judge, below Exh.5, reveals that the order restraining the appellant from creating third party interest pending the suit has been passed mainly on the premise that the entire sale consideration of the suit property has not been paid to the respondent which raises a doubt on the validity of the sale deed dated 30.11.2021, which the appellant got executed on strength of the power-of-attorney. Now, the appellant has come up with a case that remaining consideration of Rs.1,50,00,000/- has not been credited to the account of the respondent through RTGS. This aspect has not been disputed by the respondent. The contention of the learned counsel for the respondent is that still an amount of Rs.30 lakhs remains to be paid, which has not been paid by the appellant, though not mentioned in the agreement to sell. It appears that inspite of credit of the said amount in the bank account of the respondent which is within the knowledge of the respondent, no further steps have been taken by the respondent. If he really wanted to cancel the sale-deed, he would have returned the said amount to the account of the appellant. The respondent remained silent for a considerable period without any fuss.

11. Evidently, the entire amount of sale consideration mentioned in the agreement to sell has been received by the respondent including Rs.1,50,00,000/- after passing of the interim

order below Exh.5. As far as the question whether there was an oral agreement with regard to the remaining Rs.30 lakhs is concerned, the Trial Court in its order dated 18.10.2022 has rightly held that this aspect will be a part of the evidence during trial. Since, the interim order was passed on the very premise of not paying the admitted balance consideration of Rs.1,50,00,000/-, which has now been paid after passing of the interim order, certainly, it has a bearing on the case and is a change in circumstance. Though, the learned counsel for the appellant vehemently submitted that the power-of-attorney, on the basis of which the sale-deed has been executed was also cancelled, but the fact remains that power-of-attorney has been cancelled by way of notice dated 13.06.2022 after execution of the sale-deed dated 30.11.2021. Cancellation of the power-of-attorney after execution of sale-deed on the strength of power-of-attorney will hardly have any consequences.

12. It is matter of record that at the time of agreement to sell, the appellant was put in possession and a layout has been sanctioned on the suit property. In addition to that, the agricultural land was converted into non-agricultural by carving out plots. It is also informed that some of the plots have already been sold by the appellant to others.

13. In view of the facts and circumstances of the case mentioned above, I find substance in the argument of the learned counsel for the appellant that now, the entire consideration mentioned in the agreement to sell has already been passed to the respondent and a lot of water has flown after the agreement to sell i.e. possession is handed over to the appellant, lay-outs of the plots were being made by converting agricultural land into non-agricultural use coupled with the fact that some of the plots have already been sold by the appellant. Hence, in my view, undue hardship will be caused to the appellant and subsequent purchasers of the said plots. As against this, the respondent, in the suit has also alternatively prayed for balance consideration due. Indisputably, the balance sale consideration of Rs.1,50,00,000/- has already been received and the dispute regarding remaining amount of Rs.30 lakhs can be decided upon by the Court during hearing in Trial. Therefore, a case is made out under the Second proviso to Order 39, Rule 4 of the CPC for vacation of the interim order dated 22.02.2021.

14. The Trial Court did not consider these facets of the case and erroneously rejected the application (Exh.31) of the appellant by passing the impugned order dated 13.06.2023. Therefore, the impugned order does not sustain and is hereby set aside.

15. Consequently, the order dated 18.10.2022, passed by the Trial Court, below Exh. 5, restraining the appellant from alienating or creating third party interest in the suit property during disposal of the suit is vacated.

16. The appeal is allowed in the above said terms.

(M. W. CHANDWANI, J.)

RR Jaiswal