



**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

APPEAL FROM ORDER NO. 10 OF 2024

1. Padam @ Suresh s/o Raising Kudale
Age; 51 years, Occ; Agri,
R/o; Gut No. 61, in front of Kamalnayan Bajaj
Hospital, Satara, Aurangabad.
2. Charan s/o Padam Kudale
Age; 28 years, Occ; Agri,
R/o; As above.
3. Puja D/o Padam Kudale
Age; 20 years, Occ; Education,
R/o; As above.

...APPELLANTS

(Original Defendant Nos. 1, 2 & 4))

VERSUS

1. Kiran s/o Prabhakar Deshmukh
Age; 57 years, Occ; Business,
R/o; Flat No. 1, Sumangal Park,
Osmanpura, Aurangabad.
2. Sow. Asha w/o Shivaji Nawale,
Age; 50 years, Occ; Business,
R/o; Plot No. 20, Shivneri, Bhagyanagar,
Aurangabad.

...RESPONDENT NOS. 1 & 2

(Original Plaintiffs)

3. Shubham s/o Padam Kudale,
Age; 22 years, Occ; Business,
R/o; Gut No. 61, in front of
Kamalnayan Bajaj Hospital,
Satara, Aurangabad.
4. Yogesh s/o Baburao Kadam,
Age; 32 years, Occ; Business,
R/o; N-4, CIDCO, Aurangabad.

...RESPONDENT NOS. 3 & 4

(Orig. Defendant Nos. 3 & 5)

.....
Mr.N.P. Runwal : learned Advocate for Appellants
Mr. Pushpak U. Gujrathi h/f Mr.V.P. Latange : learned Advocate for
Respondent No.1
Respondent Nos. 2 & 3 are served
Mr. D.L. Pallod : learned Advocate for Respondent No.4
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CORAM : S. G. CHAPALGAONKAR, J.

Date :- 08.04.2025

JUDGMENT :

1. Appellants impugn order dated 06.01.2024 passed by Civil Judge, Senior Division, Aurangabad in Special Civil Suit No. 462 of 2022, below Exhibit 5, by which appellants/Original Defendant Nos. 1, 2 & 4 have been restrained from obstructing possession of plaintiffs, alienating or otherwise encumbering property described in paragraph No. 10.

2. Respondent Nos. 1 and 2/ Original Plaintiffs instituted Special "Civil Suit No. 412 of 2022 seeking relief of specific performance of contract and perpetual injunction. Plaintiffs contend that defendants are owners of plot Nos. 17 to 28 ad-measuring 17493 Sq. feet situated at Gut No. 61 at Satara, District Aurangabad. Defendants approached plaintiffs and expressed their desire to develop suit property. Plaintiffs accepted proposal and consented for development of property. It was decided to register development agreement and to start actual construction. Initially, on 18.10.2016 at

the time of oral agreement, plaintiff No. 1 received an amount of Rs. 2,00,000/-. Tentative construction plan of apartments was prepared. As per plan, 28 flats are to be constructed and out of that 9 flats were decided to be given to defendant No. 1. Entire expenses of construction including development charges, construction permission, Architectural charges, leveling of land, construction of road were to be borne by land owners and developers were to construct entire Apartment building at their costs. Plaintiffs had agreed to pay an amount of Rs. 25,00,000/- at the time of registered development agreement to defendant Nos. 1, 2 and 4. Accordingly, registered agreement for development of suit property was to be executed.

3. In pursuance to aforesaid agreement Mr. Pradeep Raosaheb Patil was engaged as an Architect. On the basis of tentative lay out plan, Architect fixed boundaries. Total amount of Rs. 8,10,000/- has been released in favour of defendants. They had agreed to execute registered development agreement and General Power of Attorney (for short "G.P.A.") after receiving construction permission. Plaintiffs are put into possession by defendant Nos. 1 to 4 for further development. Plaintiffs have leveled entire land for making construction and demarcated property. They invested amount of Rs. 4,00,000/- for that purpose. They paid Architect fees of Rs. 3,00,000/-, appointed workmen and paid their salary. Amount of Rs. 5,00,000/- has been incurred for construction of site office. They also made expenses of Rs. 20,000/- for advertisement. Plaintiffs requested

defendants to accept balance deposit amount and execute registered development agreement and G.P.A. so that they can proceed to deposit development charges and obtain construction permission, however, defendants sought time under pretext that they had some dispute with Vanmala Wankhede. According to plaintiffs, aforesaid litigation is pending vide Regular Civil Suit No. 988 of 2019 which is kept pending without progress. Meanwhile, plaintiffs came across news paper notification dated 30.08.2020 published in Daily 'Lokmat and "Divya Marathi' as regards suit property which depicts that suit property has been agreed to be sold by defendant Nos. 1 to 4 to some prospective purchaser. Plaintiffs raised objection dated 02.09.2020 and found that defendants executed registered partition deed dated 28.06.2018 and partitioned Gut No. 61 as shown in suit property. As such, defendants have committed Criminal breach of trust after making plaintiffs to invest huge amount and also they are also trying to alienate property.

4. Plaintiffs have also filed an application below Exh. 5 under Order XXXIX Rule 1 & 2 of Code of Civil Procedure for grant of temporary injunction against defendants thereby praying to restrain defendant Nos. 1 to 4 from alienating suit property and creating third party interest or causing obstruction into peaceful possession of plaintiffs over suit property.

5. Defendant Nos. 1, 2 and 4 filed Written Statement. They

admitted execution of Memorandum Of Understanding (for short "M.O.U.") dated 14.07.2017 and payment of Rs. 8,10,000/- by plaintiffs, however, raised objection as to jurisdiction of Civil Court in view of provisions of Commercial Courts Act 2015 (Amendment Act 2018). According to them, since M.O.U. is un-stamped and un-registered, plaintiffs cannot claim relief of specific performance. Similarly, agreement to enter into another agreement does not create enforceable rights under provisions of Specific Reliefs Act. According to defendants since 2017, plaintiffs failed to carry forward work as per M.O.U. Present suit is filed only with intention to create false dispute before the Court of law and to prevent sale or development of property.

6. Learned trial Court after considering rival contentions recorded prima-facie findings that Civil Court has jurisdiction to try and entertain suit. Defendants have entered into M.O.U./agreement as claimed by plaintiffs. Defendants have received a sum of Rs. 8,10,000/-. Plaintiffs are in possession of suit property for purpose of carrying development and there is reasonable apprehension that defendants may create third party interest in suit property. Accordingly partially allowed application below Exh. 5 and restrained defendant Nos. 1 to 4 from alienating or creating third party interest over suit property, so also cause obstruction or interference in possession of plaintiffs till final disposal of appeal.

7. Mr. N.P. Runwal, learned Advocate appearing for

appellants vehemently submits that tenor of development agreement dated 14.07.2017 depicts that it is commercial transaction. Suit is valued at Rs. 4,27,00,000/-. Therefore, dispute in suit is Commercial within meaning of Commercial Courts Act, therefore, as per expression used in Section 2 (1) (c) (7) with Explanation-A, dispute in present suit ought to have treated as commercial dispute and plaint ought to have been returned for presentation to Commercial Court or suit ought to have been transferred to Commercial Court. He would further submit that development agreement requires to be properly stamped and registered. In present case M.O.U. has been entered between parties. Plaintiffs cannot assert any right on the basis of such document. He would further submit that defendant No. 5 was also party to the agreement along with plaintiffs but now he withdrew from agreement. Therefore, plaintiffs cannot seek execution of same as one of partner has withdrawn and declared that he is no more interested in development of property. According to Mr. Runwal, trial Court committed serious error of law and fact while appreciating nature of dispute and contents of document dated 14.07.2017 and restrained appellants/original defendant Nos. 1 to 4 from disturbing alleged possession of plaintiffs or creating third party interest over suit property.

8. Per Contra, Mr. V.P. Latange, learned Advocate appearing for respondents/Plaintiffs supports impugned order.

9. Having considered submissions advanced following points arose for consideration in this appeal :

(i) Whether dispute in suit is of commercial nature within meaning of Commercial Court Act, 2015, as such Civil Court lacks jurisdiction. ?

(ii) Whether suit is barred by limitation since relief is claimed on the basis of M.O.U./agreement dated 14.07.2017. ?

(iii) Whether M.O.U./ agreement dated 14.07.2017 can be enforced in absence of registration or payment of stamp duty. ?

(iv) Whether plaintiffs have made out prima-facie case for grant of relief as prayed. ?

10. Perusal of M.O.U./agreement dated 14.07.2017 depicts that it is a notarized document whereby plaintiffs and defendants settled terms with intention to develop suit property and distribute constructed tenements amongst them. At initial stage, developers/ plaintiffs agreed to pay sum of Rs. 25,00,000/- to defendant Nos. 1, 2 and 4 and then enter into registered development agreement with G.P.A. A tentative lay out plan has been already sanctioned as regards suit property. It was decided that plaintiffs developers would complete basic ground work to bring property at development stage and obtain development permission to construct apartments. After getting construction permission a registered development agreement was to be executed between parties. Execution of M.O.U. is not in dispute. Even parting of Rs. 8,10,000/- by plaintiffs in favour of defendants is also

not in dispute.

11. It is true that plaintiffs and defendants entered into M.O.U. with an intention to develop suit property as apartment but development agreement was to be executed after getting construction permission and same was to be registered. The M.O.U. dated 14.07.2017 is an agreement between parties, however, it cannot be given status of development agreement at this stage. In this background it is apposite to refer relevant provisions of Commercial Act, 2015 to find out whether suit involves commercial dispute.

12. Section 2 (1) (c) (vii) of the Commercial Courts Act defines Commercial dispute as under :

“(2) Definitions – (1) In this Act, unless the context otherwise requires :-

(c) “Commercial dispute” means a dispute arising out of -

(vii) Agreements relating to immovable property used exclusively in trade or commerce; “

13. Section 5 of the Act deals with constitution of Commercial Appellate Division. Section 15 deals with transfer of pending cases and further provides that all matters will fall under jurisdiction of Commercial Court Act and Commercial Division of High Court when it involves commercial dispute within the meaning of Section 2 (1) (c) of the Act and for specified value as per Section (2) (i) of the Act.

14. As is discernible from statement of objects and reasons of Commercial Courts Act, the Commercial Courts have been established to deal with high value commercial disputes having complex facts and question of law and aimed for early resolution of commercial disputes to create a positive image before investor world about the independent and responsive Indian legal system.

15. Supreme Court of India in case of **Ambalal Sarabhai Enterprises Ltd. Vs. K.S. Infraspace LLP & Anr.**,¹ while dealing with dispute wherein parties had executed memorandum of understanding depicting deed of conveyance of land. After considering relevant provisions of commercial Court Act observed thus :

“It appears that the trial court has proceeded under the footing that the parties to the suit more particularly, the appellant-plaintiff seems to be carrying on business as Estate Agent and to manage land, building, etc. and the very object as enumerated in Memorandum and Articles of Association of the appellant-plaintiff company established that the property in question are being used exclusively in trade or commerce rather in the business of the plaintiff. As rightly pointed out by the High Court, there is nothing on record to show that at the time when agreement to sell came to be executed in 2012, the property was being exclusively used in trade and commerce so as to bring dispute within the ambit of sub-clause (vii) of Section 2 (1) (c) of the Act. Merely because, the property is likely to be used in relation to trade and commerce, the same cannot be the ground to attract the jurisdiction of the Commercial Court.”

¹ 2010 (15) SCC 585

16. Similarly this Court in case of **J.P. Realities Pvt. Ltd Vs. Mahesh Chandrabhan Kingrani**,² relied upon law laid down by Supreme Court in the case of **Ambalal Sarabhai Enterprises Ltd.** (supra) observed as under :

“Dispute relating to immovable property which is actually used or being used in trade of commerce would come within the sweep of commercial dispute as enumerated in Clause (vii) of Section 2 (1) (c) of the Act, 2015. The suit for specific performance of contract of immovable property, without reference to the actual use of the immovable property in trade or commerce as on the date of the suit will not be a suit relating to a commercial dispute.”

17. Keeping in mind aforesaid exposition of law, it can be observed in facts of present case that parties are yet to reach at stage of development agreement. Just a M.O.U. has been entered by them setting primary terms before entering into development agreement so as to bring suit land to a stage of development. Parties agreed that proposed developer would take necessary steps for leveling of land, prepare building plan, obtain necessary sanction permission, construct drainage etc. Plaintiffs paid certain amount to defendants in lieu of agreement. Amount of Rs. 25,00,000/- was to be paid before entering into registered development agreement and G.P.A. in favour of plaintiffs. Apparently at the time of execution of M.O.U. suit property was not ready for commercial use, nor it was used for commercial purpose. As observed by Supreme Court in case of

Ambalal Sarabhai Enterprises Ltd. (supra) unless property is in actual use or being used in trade or commerce, dispute of such immovable property cannot be treated as commercial dispute. Even from reading of prayers incorporated in plaint, plaintiffs are seeking specific performance of M.O.U. and to execute development agreement, hence it is difficult to hold that dispute raised in suit is commercial dispute within expression used in Section (2) (1) (iii) (vii) of the Commercial Courts Act. Therefore, this Court hold that Civil Court has jurisdiction to entertain present suit or suit need not be transferred to Commercial Court as mandated under Section 15 of the Commercial Courts Act.

18. So far as, issue as to limitation is concerned, essentially it would be mixed question of law and fact. However, from prima-facie consideration of pleadings and contents of M.O.U. dated 14.07.2017, it can be observed that no specific period for execution of development agreement has been fixed by parties. Even period for development of property has not been fixed. Therefore, limitation for claiming relief of specific performance would start from date when defendants refused to act upon agreement. Plaintiffs have pleaded cause of action to file suit when defendants attempted to take possession of suit property **on 26.04.2022**. Therefore, at this stage contention of appellants that suit is barred by limitation cannot be accepted. Issue can be adjudicated only after recording of evidence by parties along with other issues at trial.

19. It is argued that in absence of registration of document, M.O.U. cannot enforced. Although such argument is advanced no provisions from Indian Stamp Act or Registration Act brought to notice of this Court which mandates document in the form of M.O.U. to be compulsorily registered. As observed in earlier paragraphs, on meaningful reading of M.O.U. it is an agreement to enter into development agreement which itself does not constitute development agreement, in strict sense. It is true intention of parties and proposed terms for development agreement are stipulated, which creates rights and obligations between parties. As observed by this Court in case of **Arun P. Gorada Vs. Manish Jaisukhalal Shah and Others**,³ an agreement would be enforceable which creates interest in favour of plaintiffs in proposed development of property.

20. This Court in case of **Chheda Housing Development ... vs Bibijan Shaikh Farid And Ors.**,⁴ set out instances of agreements which are enforceable and which are not enforceable. It stipulates that if no rights are created in favour of developers who has been entrusted work of development, agreement may not be enforceable. However, once right is sought to be created in favour of developers upon development of property an agreement would be enforceable. In light of aforesaid exposition of law, if stipulations in agreement/M.O.U. in present case are considered, this Court prima-facie hold that plaintiffs

³ 2009 (1) Mh.L.J. 611

⁴ 2007 (4) AIR Bom. R 54

are entitled to maintain suit for specific performance on the basis of agreement, as certain rights are created infavour of plaintiffs. However, it is made clear that trial Court upon recording of evidence can delve into intention of parties at time of execution of agreement and rule on enforceability of M.O.U. by way of suit for specific performance of contract.

21. So far as last point as to whether plaintiffs makes out prima-facie case to grant relief as claimed. Again contents of agreement are required to be appreciated along with pleadings of parties. Execution of M.O.U. dated 14.07.2017 is not in dispute. Parting of amount of Rs. 8,10,000/- by plaintiffs to defendants is also not in dispute. Stipulation in paragraph No. 4 (c) of agreement makes it clear that Rs. 25,00,000/- was to be paid by developers before handing over possession and entering into registered development agreement with G.P.A. Although developers were given entry over plot for propose of work of leveling of land, fixing boundaries and bringing land at stage of development, developers cannot claim that they were put into possession of land. Unless development agreement is executed and possession is handed over to developers, developers cannot claim exclusive possession over suit property in exclusion of true owner. However, fact remain that developers are entitled to seek execution of development agreement, as per terms of M.O.U. after complying with their part of contract. In such situation, if defendants transfers property or creates third party interest, plaintiffs are likely to

suffer irreparable loss, therefore keeping in mind basic principles for grant of temporary injunction, plaintiffs have certainly made out a case to temporary restrain defendants from transferring or creating third party interest over suit property till adjudication of dispute in suit. However, plaintiffs cannot seek injunction against defendants/owners restraining them from entering into suit property or claim their exclusive possession over suit property.

22. In result, order passed by trial Court needs to be modified by partly allowing appeal.

23. Hence following order :

ORDER

- (i) Appeal Against Order is partly allowed.
- (ii) Impugned order dated 06.01.2024 passed by Civil Judge, Senior Division, Aurangabad, below Exh. 5 in Special Civil Suit No. 462 of 2022 is hereby partly modified.
- (iii) Pending hearing and final disposal of Special Civil Suit No. 462 of 2022, defendant Nos. 1 to 4, through their agents, servants or anybody claiming through them are temporarily restrained from alienating or otherwise encumbering property described in paragraph Nos. 1 of the plaint.
- (iv) Order to the extent of direction against

defendant Nos. 1 to 4 restraining them from obstructing plaintiffs possession over suit property is quashed and set aside.

(v) Appeal Against Order/Application stands disposed off in above terms.

(S. G. CHAPALGAONKAR)
JUDGE

mahajansb/