IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 77 OF 2025
WITH
CIVIL APPLICATION NO. 11011 OF 2025
IN AO/77/2025

1. Mr. Asad Choudhari S/o
   Abdul Hasan Choudhari
   Age: 48 years Occu: Business

2. Mrs. Afroze Arif Khan
   Age: 44 years, Occ: Business

3. Mrs. Asima Vajulla Kanchwala
   Age: 52 years, Occu: Business

All R/o: C/o Babu Bhai Kanchwala,
Behind Telephone Exchange,
Chembur Naka, Chembur,
Mumbai 400071 **.....APPELLANTS/ Original defendant Nos.1 to 3**

VERSUS

Mr. Shakil Ahmed Siddhiqui
S/o Sageer Ahmed Siddhiqui
Age: 57 years, Occu: Business and Agri.
R/o: Plot No.146, Near MGM Hospital,
Motiwala Nagar, CSN (Aurangabad) **....RESPONDENT/ Original Plaintiff**

Shri. S. V. Adwant, Advocate for the Appellants
Shri. Sanjeev Deshpande, Senior Advocate I/b. Patel Shaikh Ashpak Taher, Advocate for the Respondent

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CORAM	:	**SHAILESH P. BRAHME, J.**
RESERVED DATE	:	**04.11.2025**
PRONOUNCED DATE	:	**12.11.2025**

JUDGMENT :-

1. Heard both sides finally with the consent of the parties.

2. This Court is called upon to decide as to whether the injunction granted by the Trial Court restraining the defendants from creating any third-party interest in the suit land is legal and proper. Appellants are original defendants and the respondent is the original plaintiff in Special Civil Suit No.172 of 2025, filed for the relief of specific performance of contract and injunction. Parties are referred to by their status in the Trial Court.

3. Appellants/defendants are the owners of Gut No.1 (1H 50R) and Gut No.3(9H 55R) situated at Jainpur, Tq. Paithan, Dist. Chh. Sambhajinagar. The total area of 26 Acres 15 Guntha is the subject matter of the controversy.

4. The respondent/plaintiff claims that by oral agreement dated 06.01.2025, defendant agreed to sell the suit land for consideration of Rs.3,12,00,000/- and earnest of Rs.4,90,000/- was paid from 27.12.2024 to 03.01.2025. The possession is contended to have been handed over to the plaintiff. The balance amount was to be paid and the sale deed was to be executed before 15.04.2025. The plaintiff learnt that defendants were trying to sell the suit land for better consideration, dodging the transactions between the plaintiff. Hence Special Civil Suit No.172 of 2025 was required to be filed along with an application at Exhibit-5 for injunction.

5. The defendants contested the application at Exhibit-5 as well as plaint by plea of total denial of any deliberations or oral contract. It is contended that the plaintiff is trying to grab the suit land at a low price. The payment of the earnest amount has also been denied. The case of the plaintiff is stated to be totally false and concocted. It is specifically pleaded that the defendant had already entered into an agreement to sell on 24.11.2024 with one Mr. Javed Khan Rashid Khan for consideration of Rs.5,62,50,000/-. It is contended that memorandum of understanding was executed between defendants and Mr. Bassy S.E.Kuzhimanil Mathai Mathew. Earnest amount of Rs.51,00,000/- was received by the defendants. In view of the above facts, the application and the suit are prayed to be dismissed.

6. By order dated 09.05.2025, the learned Trial Judge allowed the application Exhibit-5 and restrained the defendants from creating third-party interest till disposal of the suit. Taking exception to the order, the present appeal is filed.

7. Learned counsel Mr. S. V. Adwant, submits that entire claim of the plaintiff is false, bogus and concocted and it is made to grab the property at a low rate. It is submitted that there are no material particulars regarding the alleged oral transaction, handing over of the possession, plea of verbal and written request or recourse to the revenue authorities. It is further submitted that much prior to the filing of the suit, the defendants entered into an agreement of sale on 24.11.2024 with Mr. Javed Khan Rashid Khan and received Rs.11,00,000/- towards earnest amount. Thereafter, a memorandum of understanding was executed on 24.02.2025 for consideration of

Rs.5,62,50,000/-. The documentary evidence placed on record in this regard has not been dealt with by the Trial Court. It is further submitted that the theory of having received Rs.4,90,000/- as earnest is unconscionable and against the policy of the Central Government.

8. Learned counsel further submits that there were no cordial relations between the parties so as to have any oral transaction for such a huge amount. It is submitted that the learned Judge committed perversity in recording inconsistent findings in respect of handing over of possession. The material aspects of the matter are overlooked by the Trial Court. It is further submitted that the learned Trial Judge committed grave error of jurisdiction in granting injunction when there is no *prima facie* case to show enforceable oral contract or semblance of any contract. There is no *prima facie* case or balance of convenience in favour of the plaintiff, still injunction is granted on extraneous considerations. It is submitted that no irreparable loss could have been caused to the plaintiff.

9. Per contra, learned senior counsel Mr. Sanjeev Deshpande repeals the submissions by submitting that this Court has very limited scope under Order 43 of the C.P.C. to interfere in the impugned order. It is submitted that the defendants failed to make out a case of perversity or patent illegality and the discretion has been rightly exercised by the Trial Court. It is further submitted that the impugned order is innocuous and only preserves the property, which is beneficial to the parties. It is further submitted that the theory of execution of memorandum of understanding is misconceived because the oral agreement executed between the parties on 06.01.2025 was not superseded. It is submitted that *prima facie* case is made out by the affidavits of the witnesses and a full-fledged trial is required to decide the rival claims. It is also submitted that the implications as per Income Tax Act and the policy of the Central Government can be dealt with during the course of trial.

10. Having considered the rival submissions of the parties and having gone through the notes of written submissions tendered by the appellants and the compilation of the documents which are part of record, the plaintiff has founded his suit for specific performance of contract on the oral agreement which had taken place between the parties on 06.01.2025. He claims that consideration of

Rs.3,12,00,000/- for area of 26 Acres 15 Guntha is agreed and out of that earnest of Rs.4,90,000/- in cash has been parted with. As against that, the defendants have come up with a contract of sale executed in writing on 24.11.2024 with Mr. Javed Khan Rashid Khan and thereafter, a memorandum of understanding in favour of Mr. Bassy on 24.02.2025. They have placed on record bank statements, cheques and the recitals to support the payment of earnest amount of Rs.51,00,000/-.

11. At the outset, it needs to be made clear that this Court is guided by the law laid down by the Hon'ble Supreme Court in ***Wander Limited Vs. Antox India Private Limited; 1990 MLJ (2) 1 : 1990 DGLS (SC) 269 : 1990 SCC (Supp.) 727 : 1990 Arb.L.R. (2) 399*** for entertaining the appeal under Order 43 of the C.P.C.. It is an Appeal on principles and unless there is perversity or patent illegality or arbitrariness the interference in the impugned order is not permissible. The re-appreciation of the facts and possibility of another view cannot be the grounds to interfere with the impugned order.

12. A huge chunk of land is agreed to be sold by the defendants to the plaintiff for Rs.3,12,00,000/- and out of that, earnest amount of Rs.4,90,000/- is said to have been paid to the defendants. The reason shown by the plaintiff for not executing any written form of contract is the cordial relations between the parties. My attention is adverted to the proceedings of RCA No.254 of 2016 filed by the plaintiff against defendant no.1. It was emanating from Special Civil Suit No.251 of 2013 filed by the plaintiff for possession which was dismissed on 21.01.2015, albeit for some other property. It is not possible to countenance that the relations are cordial and no necessity was felt to enter into any contract in writing.

13. It's a trite law that when relief of specific performance of contract is founded on oral contract, heavy burden lies on the plaintiff. The plaintiff is under obligation to *prima facie* show the existence of such oral contract, payment of earnest amount and the possession of the suit land. To corroborate the claim, the plaintiff relied on the affidavits of Mr. Mohd. Azeem Abdul Samad Saudagar, Mr. Shaikh Sohel Shaikh Basheer, Mr. Faiyaz Ahmad Shaikh and Mr. Arshad Khan Saleem Khan. No material is placed to show payment of earnest of amount of Rs.4,90,000/- to the defendants in cash. The plaint lacks material particulars for the plea raised in para 7 about the verbal and written request and plea of para 8 of having approached the revenue authorities. The plaintiff could have placed on record the circumstances or the material to infer oral agreement.

14. The plaint shows a specific plea of handing over of possession, but it does not spell out the time. No panchanama or possession receipt or any corroborative material is produced on record to indicate that the plaintiff is in possession in pursuance of the oral agreement. In the impugned order inconsistent observations are recorded by the learned Judge in para 16 regarding handing over of possession. The plaintiff is recorded to be in possession of the suit land which is totally misconceived and unfounded. It is rightly contended by the learned counsel Mr. Adwant that the finding in respect of possession is perverse.

15. It is overlooked by the learned Judge that the defendants have placed on record voluminous material to show that on or about 24.11.2024, an agreement was executed between the defendants and

Mr. Javed Khan Rashid Khan. Thereafter, a memorandum of understanding was executed on 24.02.2025 in favour of Mr. Bassy. The defendants have been paid earnest amount to the tune of Rs.51,00,000/-, the photocopies of the cheques, extracts of the bank transaction, the statements and recitals of memorandum of understanding corroborate their theory. The impugned order does not refer to this material aspect which amounts to patent illegality on the face of the record.

16. There is no iota of evidence of alleged oral agreement between the parties. It was possible for the plaintiff to show the existence of the agreement by surrounding circumstances, revenue record or any such messages or written request. It is difficult to fathom that the parties would prefer to go for an oral agreement for such a huge monetary transaction. Under the specious observation that everything would be decided after a full-fledged trial, the plaintiff can not be absolved from making out *prima facie* case and balance of convenience.

17. My attention is adverted to the affidavits filed by the plaintiff in support of the plaint as well as Exhibit-5 which are very cryptic. The affidavits of Mr. Mirza Baig and Mr. Vajiulla Kanchwala support the case of the defendants that there was no oral agreement. The submissions of the learned counsel for the appellant have substance that neither there was any oral contract nor was it legally enforceable one. The reliance is placed on the judgment of ***Correspondence, RBANMS Education Institution vs. B. Gunashekar 2025 SCC Online SC 73*** to buttress that transaction above Rs.2,00,000/- made in cash are liable for the penal action under Section 271DA of the Income Tax Act. I have gone through para 18.1 as well as 19 of the judgment. It is apposite to reproduce the relevant extract of para no.18.1 as follow :

> “18.1. Further, through the averments made in the plaint and in the agreement, the respondents/plaintiffs have claimed to have paid huge sum towards consideration by cash. It is pertinent to recall that Section 269ST of the Income Tax Act, was introduced to curb black money by digitalising the transactions above Rs.2,00,000/- and contemplating equal amount of penalty under Section 271DA of the Act. As per the said provisions, action is to be taken on the recipient. However, there is also an onus on the plaintiffs to disclose their source for such huge cash. The Central Government thought it fit to cap the cash transactions and move forwards towards digital

> economy to curb the dark economy which has a drastic effect on the economy of the country. It will be useful to refer to the Budget Speech during the introduction of the Finance Bill, 2017 and the extract of the memo presented with the Finance Bill, 2017, which lay down the object : ……………… It is settled position that ignorance in fact is excusable but not the ignorance in law." Therefore, we deem it necessary to issue the following directions:
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> (A) Whenever, a suit is filed with a claim that Rs. 2,00,000/- and above is paid by cash towards any transaction, the courts must intimate the same to the jurisdictional Income Tax Department to verify the transaction and the violation of Section 269ST of the Income Tax Act, if any,
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> (B) Whenever, any such information is received either from the court or otherwise, the Jurisdictional Income Tax authority shall take appropriate steps by following the due process in law,
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> (C) Whenever, a sum of Rs. 2,00,000/- and above is claimed to be paid by cash towards consideration for conveyance of any immovable property in a document presented for registration, the jurisdictional Sub-Registrar shall intimate the same to the jurisdictional Income Tax Authority who shall follow the due process in law before taking any action,
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> (D) Whenever, it comes to the knowledge of any Income Tax Authority that a sum of Rs. 2,00,000/- or above has been paid by way of consideration in any transaction relating to any immovable property from any other source or during the course of search or assessment proceedings, the failure of the registering authority shall be brought to the knowledge of the Chief Secretary of the State/UT 32 for initiating appropriate disciplinary action against such officer who failed to intimate the transactions."

I find substance in the submissions of the appellants that the plea of earnest amount of Rs.4,90,000/- in cash by the plaintiff to the defendants is vulnerable and needs to be discarded at this juncture.

18. The alleged agreement to sell executed on 06.01.2025 cannot be said to be prior in time. The defendants entered into contract with one Mr. Javed Khan on 24.11.2024, thereafter, a memorandum of understanding was executed on 24.02.2025 with Mr. Bassy. The defendants received earnest amount of Rs.11,00,000/- from Mr. Javed Khan, which is well corroborated. *Prima facie,* the transaction of the defendants with these person would prevail.

19. The learned senior counsel Mr. Deshpande attacked the memorandum of understanding as it does not spell out or supersede an agreement dated 24.11.2024 executed by the defendants with Mr. Javed Khan. The agreement of the defendants and the memorandum of understanding are not inconsistent. Mr. Javed Khan has signed memorandum of understanding. The effect of those transactions can be gone into during the course of trial. I am of the considered view that in the absence of a *prima facie* case or balance of convenience, the original owners cannot be prevented from alienating the suit land.

20. The learned counsel for the appellants has relied on the judgment of ***K. Nanjappa vs. R. A. Hameed reported in (2016) 1 SCC 762***. It is relevant to refer to para 22 and 23 which reads as follows :

> "22. However, in a case where the plaintiff come forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement or a written contract, heavy burden lies on the plaintiff to prove that there was consensus ad idem between the parties for the concluded agreement for sale of immovable property. Whether there was such a concluded contract or not would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the plaintiffs that vital and fundamental terms for sale of immovable property were concluded between the parties.
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> 23. In a suit for specific performance of a contract, the Court has to keep in mind Section 20 of the Specific Reliefs Act, 1963. This Section preserves judicial discretion to grant decree for Specific performance. However, the Court is not bound to grant specific performance merely because it is lawful to do so. The Court should meticulously consider all facts and circumstances of the case and to see that it is not used as an instrument of oppression to have an unfair advantage not only to the plaintiff but also to the defendant."

In the same judgment, *inter alia* a reference is made to the earlier judgment of the Hon'ble Supreme Court as under :

> "26. In *Mayawanti v. Kaushalya Devi*, this Court observed as under : (SCC pp. 5-6, para 8)
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> 8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction

> to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."

In the absence of any semblance of contract between the parties in the present case also the impugned order amounts to making of the contract for the parties.

21. Reliance is placed on the judgment of Andhra Pradesh High Court in the case of ***Mundru Ramarao and others vs. Mundru Kresha and another 2023 SCC Online AP 2029***. I have gone through para 10 to 16. In view of the ratio laid down therein, the affidavits of the plaintiff can be said to be bland affidavits.

22. Appellants have further referred to the judgment of ***Ambalal Sarabhai Enterprise Ltd. vs. KS Infraspace LLP Ltd., reported in (2020) 5 SCC 410***. It was also case of specific performance of contract founded on oral agreement. The respondents therein filed suit for declaration as specific performance of contract. The Trial Court had restrained the defendants from creating third party interest which was affirmed by the High Court. The defendants had approached the Apex Court and it quashed the order of injunction. The following observations are relevant.

> "22. In *M.P. Mathur* v. *DTC*, (2006) 13 SCC 706, this Court observed:
> "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 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, 31^{st} Edn., p. 366)…."
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> 23. *Wander Ltd.* (supra) prescribes a rule of prudence only. Much will depend on the facts of a case. It fell for consideration again in *Gujarat Bottling Co. Ltd.* v. *Coca Cola Co.*, (1995) 5 SCC 545, observing as follows:
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> "47….Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest…."

The above ratio supports the appellants in the present case. The conduct of claiming oral agreement when they were not on good terms, unsupported plea of handing over of possession and payment of earnest in cash is objectionable and suspicious.

23. Reliance is placed by learned counsel Mr. Deshpande on ***Ramakant Ambalal Choksi vs. Harish Ambalal Choksi and others reported in 2024 DGLS(SC) 1204*** to buttress that protection under

Order 39 Rule 1 and 2 of C.P.C. is necessary, notwithstanding Section 52 of the Transfer of Property Act. The ratio laid down in para no.43 to 45 cannot be doubted and this Court is bound by it but in the present case the respondent has failed to make out *prima facie* case of existence of enforceable valid contract and its mutuality. The granting of injunction would amount to creation of contract for the respondent. Hence he is not entitled to temporary injunction.

24. For the reasons assigned above, I find that the appellants are bound to succeed. I pass the following order :

O R D E R

i. Appeal from Order is allowed and impugned order below Exhibit-5 in Special Civil Suit No.172 of 2025 is quashed.

ii. The application Exhibit-5 in Special Civil Suit No.172 of 2025 stands rejected.

iii. Civil Application No.11011 of 2025 is disposed of.

(SHAILESH P. BRAHME, J.)

PRW

1. After pronouncement of the judgment, the learned counsel for the respondent prays for continuation of the order below Exhibit-5 for a further period of eight (8) weeks.

2. The request is opposed by the learned counsel for the appellants.

3. I have already recorded that there is no *prima facie* case and balance of convenience in favour of the respondent. The claim of the respondent is founded on oral contract which cannot be made out from the available circumstances. I do not find that the respondent will suffer any irreparable loss.

4. The request of the respondent is rejected.

(SHAILESH P. BRAHME, J.)

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