

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 1057 OF 2023

WITH

INTERIM APPLICATION NO. 18449 OF 2023

- | | | | |
|----|--|---|---------------|
| 1. | Shri Nitin Marutrao Kale |) | |
| | Age: 50 Years, Occ: Business, R/o. Post: Sansar, |) | |
| | Taluka: Indapur, Dist. Pune, Pin Code – 413104 |) | |
| 2. | Sou Rina Nitin Kale |) | |
| | Age: 40 Years, Occ: Business, |) | |
| | R/o. Sansar, Taluka: Indapur, Dist. Pune |) | ...Appellants |

Versus

- | | | |
|----|--|---|
| 1. | Shri Manikrao Bajirao Malgunde |) |
| | Age: 71 Years, Occ: Agriculture, |) |
| 2. | Shri Anil Manikrao Malgunde |) |
| | Age: 45 Years, Occ: Agriculture |) |
| 3. | Shri Kashinath Manikrao Malgunde |) |
| | Age: 43 Years, Occ: Agriculture |) |
| 4. | Shri Somnath Bajiroa Malgunde, |) |
| | Age: 65 Years, Occ: Agriculture |) |
| 5. | Shri Sanjay Somnath Malgunde, |) |
| | Age: 42 Years, Occ: Agriculture |) |
| 6. | Shri Rajendar Somnath Malgunde, |) |
| | Age: 33 Years, Occ: Agriculture, |) |
| | All R/o: Malgunde Vasti, Jalocchi, |) |
| | Taluka: Baramati, Dist: Pune |) |
| 7. | Sou. Rajeshri Umesh Jankar, |) |
| | Age: Awareness, Occ: Housewife, |) |
| | R/o. Rahmatpur, Taluka: Koregao, Dist. Satara. |) |
| 8. | Sou. Sharmila Rahul Shah, |) |
| | Age: 46 Years, Occ: Housewife/Agriculture, |) |
| 9. | Shri Soham Rahul Shah, |) |
| | Age: 21 Years, Occ: Student |) |

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| 10. | Shri Om Rahul Shah |) |
| | Age: 19 Years, Occ: Business and |) |
| | Agriculture |) |
| | Respondent No. 8 to 10 |) |
| | R/o. Dhavalgiri, Cinema Road, |) |
| | Baramati, Dist. Pune, Pin Code: 413102 |) |
| 11. | Kumari Sima Tulsiram Malgunde, |) |
| | Age: 25 Years, Occ: Housework, |) |
| | R/o. Post. Kothale, Taluka: Malshirsh |) |
| | Dist. Solapur |) |
| 12. | Shri Sangram Jayvantrao Gade |) |
| | Age: 42 Years, Occ: Business |) |
| | R/o. Akansha Niwas, Amrai, Baramati, |) |
| | Dist. Pune, Pin Code: 413102 |) |
| 13. | Shri Jitesh Rajendra Nigde |) |
| | Age: 25 years, Occ: Agriculture, |) |
| | R/o at: Rajale, Ta. Phaltan, |) |
| | Dist. Satara 415523 |) |
| 14. | Shri Shailesh Jnardhan Kotmire |) |
| | Age 57 years, Occ: Service |) |
| | R/o at: Jankushum Banglo, |) |
| | Vijay Chok, Akaluj, Ta. Maharashtra, |) |
| | Dist. Solapur |) |
| 15. | Shri Prashant Vinodkumar Shah |) |
| | Age: 54 years, Occ: Business |) |
| 16. | Shri. Shrenik Prashant Shah |) |
| | Age: 27 years, Occ: Business, |) |
| | Resp. no. 15 & 16 both R/o. At:Station Road, |) |
| | Baramati, Ta. Baramati, Dist. Pune |) ...Respondents |

WITH
APPEAL FROM ORDER NO. 99 OF 2024
WITH
INTERIM APPLICATION NO. 1156 OF 2024

Shri Nitin Marutrao Kale	)
Age. 50 years, Occ: Business,	)
R/o. Post: Sansar, Taluka: Indapur,	)

Dist. Pune, Pin Code- 413104) ...Appellant

Versus

1. Shri. Dilip Bajirao Malgunde)
Age: 64 Years, Occ: Agriculture,)
R/o. Kole Vasti, Jalocchi,)
Taluka: Baramanti, Dist. Pune)

2. Shri Rahul Javahar Shah)
Age: 45 Years, Occ: Agriculture and)
Business, R/o. Dhavalgiri, Cinema Road,)
Baramati, Dist. Pune, Pin Code 413102)

3. Seema Tulshiram Malgunde)
Age: 25 years, Occ: Housewife,)
R/o. Post. Kothle, Taluka Malshirash,)
Dist. Solapur, Pin Code: 413107)

4. Shri Sangram Javantrao Gade)
Age: 42 years, Occ: Business,)
R/o. Akansha Niwas, Amrai, Baramati,)
Dist. Pune, Pin Code 413102) ...Respondents

In AO/1057/2023

Mr. Sushant Prabhune for Appellants.

Mr. Abhijit P. Kulkarni for Respondent Nos. 1 to 6.

Mr. Abhijit P. Kulkarni i/b. Ms. Sweta Shah & Mr. Abhishek Roy for Respondent Nos.8 to 10.

In AO/99/2024

Mr. Sushant Prabhune, for Appellant.

Mr. Abhijit P. Kulkarni for Respondent No. 1.

Mr. Abhijit P. Kulkarni i/b. Mr. Gourav Shahane & Mr. Shreyas Zarkar for Respondent No.2.

CORAM : M. M. SATHAYE, J.

DATED : 7th JANUARY 2025
(In Chamber)

JUDGMENT

1. Learned Counsel for the parties were finally heard on 02/12/2024

and 16/12/2024 and the appeals are kept today for passing order.

BACKGROUND

2. These Appeals arise from two suits filed by plaintiff/s for similar reliefs against two different sets of Defendants. The Appellants are Plaintiffs and the Respondents are Defendants in both the suits. The parties are hereinafter referred to in their original capacity in suits.

3. Appeal from Order No. 1057 of 2023 (AO/1057/2023) is arising out of impugned order dated 02/11/2023 passed by the Joint Civil Judge, Senior Division, Baramati below Exhibit-5 in Special Civil Suit No. 192 of 2021 (SpCS/192/2021). This suit is filed by the Appellants and one Mr. Sangram Jaywantrao Gade. Similarly, Appeal from Order No. 99 of 2024 (AO/99/2024) is filed challenging the impugned order dated 02/11/2023 passed by the Joint Civil Judge, Senior Division, Baramati below Exhibit 5 in Special Civil Suit No. 196 of 2021 (SpCS/196/2021). This suit is filed by Appellant and same Mr. Sangram Jaywantrao Gade. By the said impugned orders, the Applications of the Appellants seeking interim injunction restraining the Respondents from creating 3rd party interest, parting with possession and changing the nature of the respective suit properties, are rejected.

4. Suit properties in AO/1057/2023 (from SpCS/192/2021) is 17 R portion of Manikrao Bajirao Malgunde and 18 R portion of Somnath Bajirao Malgunde out of Gut No. 140 totally admeasuring 2 H 63 R situated at Mauje-Jalochi, Taluka – Baramati, District Pune. Likewise, suit property in AO/99/2024 (from SpCS/196/2021) is 18 R portion of Dilip Bajirao Malgunde from the same Gut No. 140. It is material to note that in the

description of all the suit properties, respective portions of lands are described with boundaries, thereby coming with a case that specifically situated portions of lands are the suit property.

5. SpCS/192/2021 is filed claiming rights in the suit property on the basis of 2 *Visar Pavatis* dated 13/05/2012 seeking specific performance thereof, praying for execution of the sale deeds and hand-over of the possession and for declaration that the sale deed dated 15/07/2022 executed by Defendant Nos. 1 to 6 in favour of Defendant Nos. 8 & 9 and further gift deed dated 01/07/2021 executed by the Defendant No. 9 in favour of the Defendant No. 10 are illegal and not binding on the Appellants. Perpetual injunction not to create third party interest / encumbrance is also prayed and Alternative prayer for damages alongwith interest is also made.

6. SpCS/196/2021 is filed claiming rights in the suit property on the basis of a *Visar Pavati* dated 31/07/2012 seeking specific performance thereof, praying for execution of the sale deed and for declaration that the sale deed dated 10/08/2017 executed by Defendant Nos. 1 in favour of Defendant No. 2 is illegal and not binding on the Appellant. Perpetual injunction not to create third party interest / encumbrance is also prayed and Alternative prayer for damages alongwith interest is also made.

7. The Respondent/Owners have filed written statement, denying claims of the Appellants and filing counter-claim for recovery of the amounts towards damages/compensation for loss of opportunity in proper land investments due to non receipt of money in time. Respondent / subsequent purchasers have filed written statement contending that they are bonafide

purchasers for valuable consideration of the suit property.

SUBMISSIONS

8. Mr. Prabhune, learned Counsel appearing for the Appellants submitted as under. That in SpCS/192/2021, Defendant Nos. 1 & 4 - Manikrao Malgunde and Somanth Malgunde have agreed to sell their suit properties for total consideration of Rs.1,76,00,666/- each, out of which Rs.46,33,333/- has been paid to them each. Similarly, in SpCS/196/2021, Defendant Nos. 1 Dilip Malgunde has agreed to sell his suit property for total consideration of Rs.2,16,51,000/-, out of which Rs.53,00,000/- has been paid to him.

9. He submitted that the suit properties are portions out of Gut No. 140, which is an ancestral hindu joint family property of respective Defendants and other Malgunde family and the Defendants have undivided shares in the said Gut Number. He submitted that for the valuable consideration, Defendants either acting as Karta of the joint family and for the benefits of the joint family or otherwise, have agreed to sell the suit properties by executing Visar Pavatis. He submitted that the agreements / Visara Pavatis are accompanied by substantial payments and the Appellants were and are ready and willing to perform their part of the contract. He submitted that when a Sale Deed in respect of another property with the Respondents was presented for registration, one member of the joint family by name Seema Malgunde, who is a defendant in both the suits, have presented an order of injunction granted by the District Court and therefore that Sale Deed could not be executed. He submitted that because of the litigation filed by said Seema, which has reached up to this Court pending in Second Appeal, Sale

deeds in the present suits also could not be executed and the Respondents did not settle the matter with the said Seema and therefore transaction could not be completed. He submitted that Respondent/Owners have executed sell deeds/gift deed in favour of third persons who are made party to the suits as subsequent purchasers. He further submitted that since there was injunction obtained by the Defendant - Seema in her suit, and it operated on the subject matter Gut No. 140 also, the Sale Deeds could not be executed and therefore, the same cannot be interpreted as lack of readiness and willingness.

10. He submitted that the impugned order is cryptic and without any reasons and is passed in a casual manner. He further submitted that balance of convenience as well as irreparable loss are in favour of the Appellants as they have parted with the considerable amounts. He submitted that doctrine of *lis pendens* cannot be an alternative or bar in granting interim injunction in the present case. He relied upon the following case-law in support of his submissions.

- (a) K. Ravi Prasad Reddy vs. G. Giridhar¹
- (b) A. Nawab John & Ors vs. V. N. Subramaniam²
- (c) Jagan Singh (Dead) Through LRS vs. Dhanwanti & Anr.³
- (d) Madhukar Nivrutti Jagtap & Ors. vs. Pramila Bai Chandulal Parandekar & Ors.⁴
- (e) Sm. Muktakesi Dawn & Ors. vs. Haripada Mazumdar & Anr.⁵
- (f) Azhar Sultana Vs. B. Rajamani & Ors.⁶
- (g) Boramma vs Krishna Gowda & Ors.⁷

1 . 2022 AIR (AP) 59

2 . 2012(7) SCC 738

3 . 2012 (2) SCC 628

4 . 2020 (15) SCC 731

5 . 1987 SCC Online Cal 51

6 . 2009 AIR (SC) 2157

7 . 2000 (9) SCC 214

- (h) A. Kanthamani vs. Nasreen Ahmed⁸
- (i) Swarnam Ramachandran vs. Aravacode Chakungal Jayapalan⁹

11. On the other hand, Mr. Kulkarni, learned Counsel appearing for the owners and subsequent purchasers submitted that the impugned order is legal and proper. He submitted that Appellants were not at all ready and willing to perform their part of the contract. He submitted that despite specific notices issued in March, 2019 giving the Appellants last chance to perform their part of contract and pay the remaining amount, transactions were not completed. He submitted that by final notice of April 2019, owners have cancelled the transactions in question and thereafter Sale deeds are executed in favour of the subsequent purchasers.

12. He submitted that after the Sale deeds are executed by owners in favour of subsequent purchasers in July 2020 and August 2017, the suits are filed belatedly in September 2021 and present injunction is sought. He submitted that Respondent/Owners have filed counter-claim, which are basically towards damages because the transactions, which were aimed at earning money in timely fashion for re-investment in other potential lands, could not be completed, since the opportunity was lost because of non-payment by the Appellants in time. He submitted that the amounts received under Visara Pavatis are to be adjusted against the claim of compensation made. He submitted that this is a clear case of purchasers being not ready and willing to perform their part of payment in timely manner and despite being called upon to do so.

13. He submitted that this is not the case where owners have cancelled

⁸ . 2017 (4) SCC 654

⁹ . 2004 (8) SCC 689

the transactions without giving any opportunity. He submitted that by specific notices, Appellants were called upon to pay the balance money and when such demands were not complied, apparently the Appellants have failed to show even *prima facie* that they were ready and willing. He submitted that since the suits are pending, the doctrine of *lis pendens* would squarely apply and this is not a case where injunction is necessary at such belated stage. He submitted that Visar Pavatis are of the year 2012. Seven years thereafter in March 2019 by specific legal notices, demand was made for completion of the transaction and the suits filed in September 2021 are belated.

14. He submitted that in the facts and circumstances of this case, the alternative prayer made by the Appellants for damages will be considered at the time of trial, alongwith counter-claim of compensation made by the Respondents. He submitted that the reason for not completing the transactions by the Appellants based on interim injunction obtained by Defendant–Seema, is not at all justified, in as much as the said injunction clearly only directed keeping aside 1/3rd part of Gut No. 140 alongwith other Gut numbers. He submitted that therefore the injunction did not apply to the whole of the Gut No. 140, which is a big piece of land admeasuring 2 H 63 R, out of which only 17 R or 18 R portions are the subject matter of the present suits. He has placed on record the documents from SpCS/188/2021, which was another suit filed by the present Appellants in which the said Seema, in November 2021 have filed written statement taking clear stand that her suit (RCS No. 71 of 2008 – Regular Civil Appeal No. 18 of 2012 resulting in SA/269/20214 in this Court) is only limited to the property in possession and ownership of Tulshiram Dagadu Malgunde and not for any

other property. This, according to Mr. Kulkarni is an additional indication that the Appellants were well aware of the fact that the injunction obtained by the said Seema did not operate for the present suit property. He has relied upon following case law in support of his case :

- (a) Nirav Deepak Modi vs Najoo Behram Bhiwandiwalla & Ors.¹⁰
- (b) Pralhad Jaganath Jawale & Ors. vs Sitabai Chander Nikam & Ors.¹¹

REASONS AND CONCLUSIONS

15. I have considered the submissions and perused the documents.

16. At the outset, it is necessary to note that the apart from relying upon the injunction order passed by either District Court or this Court in the litigation initiated by Defendant-Seema, nothing is brought to the notice of this Court to indicate any overt action by the Appellants for completion of the transactions. Apparently from the Visar Pavatis, it can be seen that payments were to be made as per time schedule agreed. The Appellants were supposed to give public notice for verifying the ownership and possession. It is the contention of the Respondent/Owners that as per their obligation in Visar Pavatis, they had got suit property measured through private surveyor and had got cement columns placed specifying the location / position of the suit property.

17. The injunction granted by this Court in SA/269/2014 is reproduced by learned Trial Court in paragraph 5 of the impugned order. Perusal of said order shows that Respondents therein were directed to keep aside 1/3rd part of various Gut numbers, including Gut No. 140 without creating any 3rd

¹⁰ 2012(3) Mh.L.J 370

¹¹ 2011(4) Mh.L.J. 137

party right till the disposal of the Appeal. It was further directed that while keeping aside the 1/3rd part, it will be ensured the same does not become land locked. This Court has specifically observed that this would adequately safeguard rights of the Appellants therein. This clearly indicates that the injunction did not operate on the entire Gut No. 140 and it operates only to the extent of 1/3rd share. There is nothing on record to show that the Appellants ever sought any clarification from this Court or the District Court about the subject matter of Visar Pavatis i.e. the present suit properties which are only 17 R or 18 R portions. It is material to note that total area of Gut No. 140 is 2H 63H which is equal to 263 R and therefore its 1/3rd portion would only be about 88 R. Therefore, the remaining area of 175 R i.e. 1H 75R was not under injunction and according to Appellants themselves, area of 17 R and 18 R portion agreed to be sold by the Respondents/Owners were having specific boundaries. Therefore it was necessary for the Appellants to seek clarification about such specific portions, if at all they were serious to complete the transactions.

18. In the facts of SpCS/192/2021, it can be seen that even after the notice issued by the Respondent/Owners in March 2019, no efforts were made to seek any clarification, if it was so needed about injunction. The Appellants simply replied to the notices, denying allegations and claiming that the agreement is still subsisting. In the plaint of SpCS/192/2021, in para 9, the Appellants have in fact accepted that as early on March 2013 itself, amount of 87 Lac was returned by the Defendant No. 4 / Owner due to issue of injunction order obtained by said Seema. This, in my view was sufficient indication for the Appellants that the transaction was not going through, requiring them to take necessary action. However they have waited

till 2021 to file the present suits, which is belated *prima facie*.

19. In the aforesaid backdrop, at least at this interim stage, the Appellants are not found 'always ready and willing' to perform their part of the contract.

20. Viewed in the aforesaid facts and circumstances, when the impugned order is perused, it can be seen that submissions made before the Trial Court by the Appellants was mainly based on the injunction granted in litigation initiated by the Defendant–Seema. The same reason is stated for not completing the transactions and not executing sale deeds. The Trial Court has considered the injunction order passed by this Court by reproducing it. The Trial Court has considered that the transaction of Visar Pavatis have taken place in the year 2012 and there is nothing on record to show that thereafter the Appellants have sent any notice or have taken any steps to take the transaction any further. The Trial Court has observed that the Appellants have not submitted anything showing their economical capacity. The Trial Court has found that Appellants have no *prima facie* case when specific performance is sought in the year 2021 about transaction based on Visara Pavatis of 2012. From the record it is clear that in both the matters the suit is filed after the original owners have executed registered sale deeds in favour of third persons/subsequent purchasers. The Respondent/Owners have also made counter-claims seeking damages / compensation for loss of opportunity and agony suffered.

21. Now, turning to the judgments relied upon by the Appellants.

22. It is not understood why the judgment in case of **A. Nawab John Vs. V. N. Subramaniyam (supra)** is relied upon. The said judgment is in respect of

Section 149, Order 7, Rule 11 & 13 of Civil Procedure Code, 1908 arising out of valuation of the suit and deficit Court fees. The present subject matter being completely different, the said judgment need not be considered further. There is increasing tendency found nowadays to rely upon judgments without verifying whether they are even connected to the case at hand, let alone applicable. May be, the explosion of data and easy availability of computer search engines are used casually. However, the lawyers and litigants must remember that the judges have precious little judicial time to consider cases and deliver judgments and a more focused reliance on case-law is required.

23. So far as judgments of **K. Ravi Prasad Reddy, Jagan Singh (Dead) Through LRS, Madhukar Nivrutti Jagtap & Ors. (supra)** are concerned, they are relied upon for the purpose of doctrine of *lis pendens vis-a-vis* necessity of grant of interim injunction. There is no dispute about law laid down in the said judgments by the Hon'ble Supreme Court. However, whether interim injunction is necessary or operation of Section 52 of the Transfer of Property Act, 1882 would sufficiently protect the parties, are issues necessarily dependent on the facts and circumstances of each case and therefore will have to be considered on case to case basis. In the present case, since the Appellants have failed to prove readiness and willingness, the said judgments would not advance the case of the Appellants in the peculiar facts of this case.

24. So far as judgment of **Smt. Muktakesi Dawn & Ors. (supra)** is concerned, the said case was arising out of grant of ad-interim *ex-parte* injunction. In the present case, the injunction is refused after hearing both the sides and therefore, on facts, the present case is distinguishable.

25. So far as judgments of **Azhar Sultana Vs. B. Rajamani, Boramma Vs. Krishna Gowda & A. Kanthamani Vs. Nasreen Ahmed (supra)** are concerned, there is no dispute about proposition of law laid down by the Hon'ble Supreme Court therein. The judgments are in support of argument about Section 16 of the Specific Relief Act, 1963 dealing with personal bars to relief of specific performance. They are more particularly relied upon in the context of readiness and willingness of the Appellants. Since in the facts of this case, it is rightly held by the Trial Court that the readiness and willingness is not proved, which aspect is also considered by this Court, the said judgments also do not advance the case of the Appellants, so far as refusal of interim injunction is concerned.

26. As far as judgment of **Swarnam Ramachandran (supra)** is concerned, it is about 'time presumed to be not essence of contract relating to immovable property'. In the present case, apart from the fact that the Appellants have not made timely payments, it is found that Appellants have not shown any overt act or any other action on their part, which would indicate that the Appellants were interested in taking the transaction further. No notice or communication is shown to this Court on the part of the Appellants which indicates their interest in continuing the transaction. The only argument is that there was injunction in existence in a litigation instituted by the Defendant – Seema, which, as already indicated above, was not in respect of the entire Gut No. 140 but was limited to 1/ 3rd portion thereof. In such situation, if the Appellants were interested in taking transactions forward, they could have approached either the District Court or this Court, which had granted injunction seeking necessary clarification. No such action was taken by the Appellants. Even after specific notice in

March 2019 issued by the Respondent / Owners calling upon the Appellants to complete the transaction giving last chance and even after the termination by the Respondent/Owners in April 2019, the Appellants have not taken any steps till filing of the suits in September, 2021. In these peculiar facts, 'lack of timely payments' is not the only the ground on which injunction is refused and therefore, the said judgment also does not advance the case of the Appellants.

27. Therefore, in my view this is not a fit case where injunction is necessary, considering lack of concrete steps or overt action indicating Appellants' readiness and wiliness. The suits are at the stage of interim relief and rival contentions will be tested on merits at the time of trial. The issue of return of part payment will be considered in light of claim and counter-claim of damages / compensation as made by both the sides.

28. In **Wander Ltd. And Another vs. Antox India P. Ltd**¹², the Hon'ble Supreme Court has laid down the law in respect of substitution of discretion by the Appellate Court in place of discretion already exercised by the Trial Court. In paragraph no. 14 of the said judgment, the Hon'ble Supreme Court has held that the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. This position has been followed thereafter consistently by this Court, which is reiterated recently by the Hon'ble Supreme Court in

¹² . 1990 (Supp) SCC 737

Ramakant Ambalal Choksi Vs. Harish Ambalal Choksi¹³

29. In the aforesaid facts and circumstances, the impugned order is neither perverse nor arbitrary nor passed capriciously. There is no error apparent on the face of the record. The reasons given and the conclusion drawn by the Trial Court is based on the material available before it. Therefore, no interference is called for. This is not a fit case to substitute the discretion exercised by the Trial Court.

30. The Appeals from Order and pending Interim Applications are accordingly dismissed. No costs.

31. Needless to mention that the suits will be decided on their own merits and in accordance with law, without being influenced by the observations either in the impugned orders or this order.

32. All concerned to act on duly authenticated or digitally signed copy of this order.

(M. M. SATHAYE, J.)

At this stage, learned Counsel for the Appellants in AO/1057/2023 requests continuation of the ad-interim relief, which was granted on 12/04/2024. Mr. Kulkarni, learned Counsel for the Respondents opposed the prayer. Considering that during the pendency of the said Appeal from Order, interim relief was granted, the same is continued for the period of four weeks from today, in AO/1057/2023 only.

(M. M. SATHAYE, J.)

¹³ . 2024 SCC OnLine SC 3538